



22 CFR Part 62

[Public Notice: 11121]

RIN 1400-AF12

Exchange Visitor Program – Au Pairs

AGENCY: U.S. Department of State.

ACTION: Notice of proposed rulemaking; request for comment.

SUMMARY: The U.S. Department of State (“Department of State”) proposes to amend existing Exchange Visitor Program regulations governing the Au pair category to clarify and modernize the au pair program, by, among other things, restructuring the child care and educational components, replacing the EduCare program with the part-time option, enhancing au pair and host family orientation requirements, formalizing standard operating procedures for rematching au pairs with new host families, and proposing new requirements to strengthen au pair protections. The Department of State encourages public comment on the proposed rule, particularly the restructuring of the au pair program and the calculation of the weekly compensation.

DATES: The Department of State will accept public comments on the proposed regulation until [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Interested parties may submit comments to the Department of State by any of the following methods:

- Visit the Regulations.gov Web site at: <https://www.regulations.gov> and search for the docket number DOS-2023-0025.
- Email: JExchanges@state.gov. You must include RIN 1400-AF12 in the subject line of your message.

- All comments should include the commenter's name, the organization the commenter represents, if applicable, and the commenter's email address. If the Department of State is unable to read your comment for any reason, and cannot contact you for clarification, the Department of State may not be able to consider your comment. After the conclusion of the comment period, the Department of State will publish a Final Rule (in which it will address relevant comments) as expeditiously as possible.

FOR FURTHER INFORMATION CONTACT: Karen Ward, Director, Office of Private Sector Exchange Designation, Bureau of Educational and Cultural Affairs, U.S. Department of State, SA-5, 2200 C Street, N.W., Washington, DC 20522-0505. Telephone: 202-733-7852. E-mail: DesignationAuPair@state.gov. **SUPPLEMENTARY INFORMATION:** The Mutual Educational and Cultural Exchange Act of 1961 (Public Law 87-256) ("Fulbright-Hays Act" or "Act") vests the Department of State with the authority to administer authorized cultural and educational programs. 22 U.S.C. 2451, *et. seq.*

Congress enacted the Fulbright-Hays Act in order to "increase mutual understanding between the people of the United States and the people of other countries," "strengthen the ties which unite us with other nations," "promote international cooperation for educational and cultural advancement," and "assist in the development of friendly, sympathetic, and peaceful relations between the United States and other countries of the world." *Id.* § 2451. Consistent with those purposes, the relevant regulations observe that the Exchange Visitor Program "assist[s] the Department of State in furthering the foreign policy objectives of the United States." 22 CFR 62.1(a).

Au pairs are foreign nationals who travel to the United States on a J-1 visa to live with an American host family, while caring for the host families' children, enrolling in educational programs, and engaging in a variety of cultural activities. To that end, au pairs are "afforded the opportunity to live with an American host family and participate directly in the home life of the host family." 22 CFR 62.31(a). The Au pair category of the Exchange Visitor Program is an

important tool of U.S. public diplomacy that furthers the Administration's foreign affairs objectives. The program develops young foreign ambassadors who return to their home countries more aware of American values, culture, and leadership, and provides reciprocal cultural and educational benefits to the American families hosting the au pair visitor, especially the young children in the au pair's care.

The Department of State has carefully crafted a uniform system of regulations designed to protect au pairs and their host families while maintaining an environment conducive to a comprehensive federal educational and cultural exchange program. It is the development of mutual understanding and shared cultures that benefits au pairs, their host families and communities, and the foreign relations of the United States. American host families compensate au pairs and subsidize the program's required educational and cultural component, while exposing their children to international and intercultural differences and similarities.

The Department of State's public diplomacy objectives are best realized if all participants in the Exchange Visitor Program have positive cultural immersion experiences. The au pair program is only one of two programs that place exchange visitors into private homes, a situation that requires recognition of the sensitive relationships that may develop in such a merged household, when participants may not always have the same expectations. Decades of au pair placements have confirmed that regulations governing this category must include enhanced monitoring requirements and protections for au pairs to safeguard their health, safety, and welfare, as well as their positive experiences as exchange visitors and to ensure that the interests of au pairs are fully respected. Au pairs specifically participate in a unique program that requires living with a host family to foster direct participation in their home life while providing child care.

The Department of State acknowledges concerns by interested third parties that there is a significant geographic variation in the cost of living across the United States and about whether the federal minimum wage rate in some states is sufficient to cover au pair expenses. There is

also an increase in the number of states and localities where the minimum wage exceeds the federal minimum wage. The Department of State also understands that collaboration with all stakeholders, including organizations that advocate on behalf of domestic workers, advances the objective of protecting the health, safety, and welfare of au pairs. Au pairs participating in a foreign policy program must be adequately compensated and protected from abuse.

The Department of State underscores the cultural immersion purpose of the au pair program, which has always distinguished au pairs from domestic childcare workers. At the same time, the Department of State wants to ensure au pairs have similar protections as those afforded to domestic workers. To this end, the Department of State proposes redefining the structure of the au pair program options and their associated hours and compensation calculations, including incorporating differences in federal, state, and local minimum wage rates so that the highest applicable rate within each tier (or the highest applicable minimum wage rate, if higher) applies to all au pairs. At the same time, the Department of State would preserve other fundamental elements of the Au pair category that underpin the success of this cultural exchange program as an immersion into American family life.

Program Structure

In accordance with its exclusive regulatory authority and to further the foreign policy and diplomacy goals of the Fulbright-Hays Act, the Department of State devised the Au pair category of the Exchange Visitor Program to be distinct from domestic childcare workers. While the au pair program provides many families with high-quality childcare, the program specializes in providing an enriching cultural experience for the children and for a young person from another country. The Department of State (and formerly the U.S. Information Agency) has implemented and overseen the Au pair category since its inception as a federally regulated program that effectuates a variety of foreign affairs objectives, including promoting cultural exchange and fostering mutual understanding. It serves as a unique diplomatic tool that achieves the Fulbright-Hays Act goals by inviting young foreign persons to live and provide childcare with American

families, learn, and absorb our culture and language, pursue additional educational opportunities, and then return to their home countries.

To further enhance the au pair program, the Department of State is proposing to set certain baselines for this type of exchange program and limit the number of childcare hours per program as outlined in proposed § 62.31(a). Au pairs and host families would choose either a “part-time” program with childcare hours between 24-31 hours per week, or a full-time program of child care hours between 32-40 hours per week. As further discussed below, the au pair’s weekly childcare compensation would be based on the maximum hours of the chosen option, even if the au pair worked fewer hours. Under this new structure, au pairs would not work hours in excess of each option’s maximum limit, except under very limited exigent circumstances with notification by the host family to the sponsor as described below. Sponsors must have policies and contingency plans in place for host families that need to report exigent circumstances and are responsible for ensuring excess childcare hours are infrequent. When part-time au pairs work more than 31 hours in a week but not more than 40 hours, they would be compensated for those excess hours at the hourly rate of the applicable tier identified in proposed paragraph (n)(4)(ii) of the regulations. When part-time or full-time au pairs work over 40 hours in a week, they would be compensated for those excess hours at the hourly rate of the applicable tier identified in proposed paragraph (n)(4)(ii) of the regulations, and they must also be paid any overtime premium due under applicable federal, state, or local law. In addition, under the proposal, au pairs must be paid any other overtime premiums due under applicable federal, state, or local law for other hours worked. For example, California law currently calculates overtime pay due on a daily basis. Proposed paragraph (j)(8) would require in the Host Family Agreement a provision that host families that have au pairs provide childcare duties for more than the maximum number of hours permitted must report this within five calendar days to the sponsor and explain the exigent circumstance requiring the additional hours. The Department of State proposes in paragraph (m)(7) that frequent reports of the au pair providing childcare in excess of the maximum number

of hours permitted or a failure to report could lead to the host family's termination from the au pair program.

The current EduCare option, under which au pairs are limited to 30 hours of weekly childcare to allow more time for study, is being replaced by the "part-time" program, with a weekly childcare range of 24 to 31 hours. The Department of State believes the name change will facilitate distinguishing between the two program options, and that, as discussed further below, the modification to the hour limitations will ensure a better understanding by host families of the need to ensure that au pairs have sufficient time to pursue the educational and cultural exchange aspects of the program. The language under paragraph (b) has also been updated to mirror other recent category changes and remove the sentence, "Such designation shall be for a period of two years and may be revoked by the Department of State for good cause" as this subject is now covered in 22 CFR 62.6(b).¹

The proposed rule maintains many regulatory provisions that have been successful over the years. However, the Department of State recognizes that there are many ways to modernize the au pair program, ensuring it is consistent with the authorizing legislation's focus on the foreign policy objective of advancing mutual understanding, while at the same time protecting the health, safety, and welfare of these exchange visitors. The proposed rule reflects this balance and maintains the program as a world class U.S. public diplomacy initiative focused on an educational and cultural mission. Major revisions proposed in this proposed rule include requiring sponsors to develop standard operating procedures and internal controls; increased au pair and host family orientation requirements; a higher standard of vetting for au pairs and host families; provisions governing sponsor relationships with third parties acting on their behalf; increased protections for au pairs; enhanced educational options (including virtual classes and volunteerism); additional reporting requirements; and finally, the proposed formalization of and

¹ Exchange Visitor Program – General Provisions, 79 Fed. Reg. 60307 (Oct. 6, 2014).

expansion of a Host Family Agreement between au pairs and host families. None of the proposed requirements placed on sponsors in this proposed rule modify the “General obligations of sponsors,” as enumerated upon in 22 CFR 62.9. As 22 CFR 62.9(d)(5) states, with regard to both the au pair program and the other exchange visitor programs that the Department of State oversees, a sponsor must “not represent that its exchange visitor program is endorsed, sponsored or supported by the Department of State or the U.S. Government, except for U.S. Government sponsors or exchange visitor programs financed directly by the U.S. Government to promote international education exchanges.” Thus, as 22 CFR 62.9(d)(5) makes clear, the au pair program and its implementing regulations do not create a relationship of agency, contract, or representation between the United States government and a program sponsor, and nothing in this rulemaking alters the status of that relationship.

Host Family Agreement

The Department of State is aware that each sponsor implements a Host Family Agreement between the host family and the au pair. While the Host Family Agreement is not a contract, it reflects the understanding between the host family and the au pair regarding the au pair’s terms of placement and expected day-to-day activities. In order to further reinforce program transparency, the Department of State proposes to require sponsors to outline placement-specific minimum requirements and disclosures in each Host Family Agreement. The proposed provision at 22 CFR 62.31(j) requires Host Family Agreements to clearly describe all sponsor and third-party fees associated with the exchange program, expected childcare duties, hours, compensation, room and board and all other deductions from compensation, paid time off for vacation and sick leave, the educational allowance, and any required training. The Department of State wants to ensure that both au pairs and host families establish realistic expectations of the au pair experience. Operating from a common point of understanding is key to a successful program.

First and foremost, the Department of State proposes that the Host Family Agreement must specifically identify and list duties and tasks acceptable to the au pair and the host family, consistent with the regulation's guidance on tasks that are appropriate for an au pair. Au pairs should not engage in, and the Host Family Agreement must not include, inappropriate duties as set out in proposed paragraph (j)(2)(ii). All expected and agreed upon duties must be identified prior to signing the agreement, though the agreement may be later updated. Au pairs are not required to perform any tasks not listed in the Host Family Agreement. Any tasks outside the Host Family Agreement performed by the au pair must be voluntary and infrequent, but they may not include activities under paragraph (j)(2)(ii). Au pairs may add clarifying language when signing the initial Host Family Agreement or through an amendment to the Host Family Agreement, to identify and add appropriate duties not listed in paragraph (j)(2)(i). Any changes to the initial or modified Host Family Agreement must be agreed upon in writing by the au pair and host family per proposed paragraph (j)(14).

The Department of State proposes to require that the Host Family Agreement include a typical weekly schedule which the sponsor has reviewed to ensure it complies with regulatory requirements (proposed paragraph (j)(3)). Although emergencies arise and there will be occasional deviations from the schedule, the creation of a typical weekly schedule allows au pairs to better plan their off-duty time (e.g., pursue cultural activities or the educational component). As with the duty lists, host families or au pairs seeking to modify the weekly schedule permanently would be required to submit the proposed change to the sponsor for review and approval before seeking written approval from the au pair or host family. The Host Family Agreement would also specify that child care hours in excess of the maximum hours allowed under the au pair's program (31 or 40 hours/week) are subject to a separate reporting requirement for host families.

The Department of State proposes to require sponsors to establish standard operating procedures covering amendment to or termination of Host Family Agreements and in the event

an au pair or host family requests a rematch (proposed § 62.31(c)(1)(ii)). The Host Family Agreement does not prevent an au pair or host family from requesting a rematch or ending their participation in the au pair program.

Program Conditions

The Department of State also proposes to change the name of the current § 62.31(c) “Program eligibility” to “Program conditions” to better capture the functionality of the provisions in this paragraph. Over the years, the term “eligibility” has become associated with baseline qualifications that enable certain entities to assume distinct roles in the Exchange Visitor Program, (e.g., entities seeking to become sponsors, sponsors seeking to become redesignated, families seeking to host exchange visitors, and foreign nationals seeking to become exchange visitors). Accordingly, the sponsor obligations that are not directly associated with the basic core programmatic functions (i.e., screening, selecting, placing, monitoring, and promoting mutual understanding), are included under the heading “Program conditions.”

The Department of State is proposing that a sponsor’s local coordinator must not have a family or work connection with any of the host families in which they have monitoring responsibilities (proposed paragraph (c)(2)(ii)). The Department of State is also proposing that a local coordinator who is only working part-time (fewer than 32 hours per week) must be responsible for placement and monitoring of no more than 15 au pairs (proposed paragraph (c)(2)(iii)). Local coordinators who work full-time for an au pair sponsor may be responsible for no more than 30 au pair placements (proposed paragraph (c)(2)(iv)). This will allow the local coordinators to spend more quality time monitoring the au pairs.

The Department of State continues to place a high priority on ensuring the health, safety, and welfare of exchange visitors on exchange programs in the United States. Although nearly 40 years have passed since the inception of the Au pair category, certain situations continue to exist that require more focused regulatory attention. The time of greatest vulnerability and uncertainty for au pairs occurs after sponsors determine that irreconcilable differences exist between a host

family and the au pair who had been placed in their home. In many such instances, it may not be clear if the irreconcilable difference were caused by the behaviors/actions of the host family, au pair, both, or neither. The Department of State relies on sponsor organizations to work with involved parties to reach a resolution. Program sponsors have a detailed understanding of each au pair placement and are the mediators between the parties. If a sponsor cannot reach a resolution acceptable to all parties, the Department of State will monitor any incidents or complaints until a resolution is reached, ensuring there is no retaliation by any party and allowing au pairs to file complaints to any local, state, or federal enforcement agency. The rematch of an au pair with a new host family involves many competing interests. The original host family is seeking continued child care pursuant to a contract with the sponsor. They may have already paid the educational stipend and perhaps given their au pair two weeks' paid time off. The sponsor may seek to minimize its costs when finding new matches for both the host family and the au pair. The au pair is seeking a continued cultural and educational experience. The host family may not be willing or able to keep the au pair in their home until a new host family can be arranged.

To address the issues surrounding au pair rematching, the Department of State is proposing that sponsors develop and implement standard operating procedures that address the range of circumstances that may evolve when an au pair leaves a host family home. The major issues associated with rematching generally can be assigned to one of the following categories: (1) where an au pair will live after leaving the host family home and who is responsible for expenses incurred during this transition period; (2) how to equitably split between the old and new host families the cost of the educational stipend and the benefits of paid time off for weekends, vacation, and sick leave; (3) the process sponsors follow to find new placements for au pairs; and, (4) the process and criteria for determining whether an au pair cannot be rematched and must end the program early. Each of these situations is discussed separately below.

When a sponsor determines that an au pair is not suited for the current placement, the Department of State's first concern is that the sponsor's standard operating procedures cover where the au pair will live and who will be responsible for living expenses (i.e., food and lodging) at no additional cost to the au pair until the au pair is placed with a new host family or returns home prior to the original program end date (proposed paragraph (c)(1)(iii)). Also, if an au pair can only be rematched with a family in a different geographical location, the issue of which party is responsible for the cost of transportation to the new location must be part of a sponsor's standard operating procedures. As proposed in paragraph (c)(1)(viii), sponsors must establish standard operating procedures and processes for handling issues, complaints, and emergencies during routine monitoring, as well as written concerns by au pairs or host families.

Individuals seeking to become au pairs anticipate positive experiences, so it may not occur to them that they could face several days or weeks after leaving a host family home when their wages stop, but their need for food and/or lodging does not. Sponsors would be required to develop plans to cover such situations and inform applicants of these plans before accepting them into their programs. Au pairs not eligible for a rematch should be assisted immediately in returning to their home country.

The Department of State is proposing a new paragraph (c)(3) on vetting foreign third parties, beyond what is required in § 62.9(f). Proposed paragraph (c)(3)(ii) provides that sponsors would annually review and maintain specific documentation for foreign third parties (i.e., proof of business license, disclosure of legal actions, summary of exchange program experience, marketing materials, and financial statements). Sponsors would also implement standard operating procedures and internal controls to ensure that foreign entities comply with the terms of such agreements.

Host Family Eligibility

As with the proposed rule for local coordinators, proposed paragraph (h) provides that host family members must not be a relative to the au pair and the host family commits not to reside

outside of the United States and its territories for longer than a cumulative total of 30 days or at a domestic location within the United States that is more than one hour's drive from a local coordinator for longer than a cumulative total of 30 days during the au pair's program. Au pairs make the commitment to a host family placement in the United States for one year and would not be required to reside outside the United States for more than 30 days.

Orientations

The proposed rule distinguishes between the orientation requirements prior to departure and post-arrival for au pairs (§ 62.31(f)). There is also a proposed paragraph for host family orientations (§ 62.31(i)). Proposed § 62.31(f)(1)(i) would establish that before au pairs depart their home countries, sponsors (or third parties acting on their behalf) must present to the au pairs an executed copy of the Host Family Agreement (if they do not already have one in their possession). The entities that conduct the pre-departure orientation must ensure that the agreement is signed and initialed by both parties. Au pairs would continue to not be permitted to travel to the United States without a fully executed agreement. Sponsors would also be required to inform au pairs of the requirement that they take with them either a pre-paid return airline ticket or a pre-paid voucher equivalent to the cost of a return ticket to ensure that they can fund their return trip home at the end of the program (proposed paragraph (f)(1)(iii)). As will be discussed *infra*, sponsors that are unable to rematch qualified au pairs would be required to refund to the au pair a portion of the cost of the return ticket, based on the length of time the au pair participated in the program. This section also maintains the requirement that au pairs be apprised of the role that the au pair program plays in achieving U.S. foreign policy objectives by exposing participants to U.S. values, customs, and norms. They also must be advised of the importance of completing the educational component of their program.

Host family orientation is an important part of an au pair placement because setting realistic expectations at the outset helps to ensure a successful placement. The Department of State proposes to add several requirements to this paragraph. First, the proposed rule would specify

that host family orientations cannot take place until the placement is secured and that all adult members of the household must participate in the orientation (proposed paragraph (i)(1)).

Sponsors may work with the host family on accommodations so that all members of the household receive the orientation. The proposed regulation would also identify certain documents that the sponsor (or local coordinator) must provide and certain topics they must discuss. The documents a sponsor (or local coordinator) must present include the following: a copy of the fully executed Host Family Agreement; a copy of § 62.31 of the au pair regulations and any Department of State-issued brochures or letters regarding the au pair program; and a print-out of the current page(s) from the Internal Revenue Service's website on the topic of taxation of nonresident aliens. The link can be found at:

<https://www.irs.gov/individuals/international-taxpayers/taxation-of-nonresident-aliens>. The sponsor should focus a discussion around the following topics: the purpose and intent of the au pair program and the family's role in achieving foreign policy objectives; cultural differences; all topics listed in the Host Family Agreement; the process of documenting au pair work hours; reporting problems and seeking assistance from the sponsor organization and/or the Department of State; the sponsor's obligation to ensure they provide the au pair a safe, comfortable, and clean home environment; and the sponsor's policies on reporting to the sponsor any material changes in family circumstances or composition, as well as sponsor policies for when an au pair needs to rematch with a host family.

Any training that the au pair requires prior to the beginning of their exchange program shall be provided by the sponsor as proposed in § 62.31(g) and may be compensable under the Fair Labor Standards Act (FLSA) and/or applicable state and local law. *See* 29 CFR 785.27 through 31.

Protections

The Department of State has included a new paragraph “Au pair limitations and protections” in proposed § 62.31(k) to ensure that the au pair’s time is balanced appropriately between personal time (for pursuing educational and cultural activities) and child care time.

First, the Department of State would identify leave benefits to which an au pair is entitled, (e.g., adequate time off between child care duty obligations for rest and guaranteed paid time off and sick leave). Such benefits would also apply to au pairs who have extended their programs, and the number of days of leave for extensions are scaled to match the length of the extension period. With respect to paid time off, host families would be required to grant the leave that the au pair requests, so long as such request is made four weeks prior to the beginning of such leave. Of course, host families may be flexible and allow such leave if the au pair requests it with less lead time.

At a minimum, sponsors would ensure that host families give au pairs an uninterrupted eight-hour period of rest every 24 hours to ensure adequate sleep and time away from duty (proposed paragraph (k)(1)(ii)). In addition, host families must give au pairs one and one-half consecutive days off (36 hours) each calendar week and one complete weekend (48 hours) off each calendar month. The Department of State is introducing sick leave into the au pair program at the rate of 56 hours of paid sick leave for a 12-month program and a prorated number of sick leave hours for program extensions shorter than 12 months (proposed paragraph (k)(1)(iv)). If the need for sick leave is foreseeable, the request should be made seven days in advance. If the need for sick leave is not foreseeable, the au pair should request leave as soon as practicable after becoming aware of the need for sick leave.

This rulemaking also proposes in § 62.31(k)(1)(v) to provide 80 hours of paid time off (i.e., the equivalent of ten working days) for a 12-month program, at a time the au pair requests. The host family must permit the au pair to take 40 hours of such leave in conjunction with a 36- or 48-hour weekend. Additional guidance to sponsors in ensuring compliance with the regulations include clarification that host families cannot dictate when au pairs may take vacation and they

may not subtract any time off from the au pair's 80 hours leave time if the au pair joins a family vacation.

Further, the proposed rule would explicitly state that no host family may deprive an au pair of access to, or hold or withhold without the au pair's permission, an au pair's identification papers (including passport and Social Security card), cellphone, flight tickets or other travel documents, Form DS-2019, or other personal property, or prevent communication between an au pair and the sponsor or the Department of State at any time, and between the au pair and his or her family while the au pair is not providing child care (§ 62.31(k)(1)(vi)). Sponsors would be required to ensure that host families provide au pairs a safe, comfortable, and clean home environment free from sexual harassment, exploitation, or any other form of abuse, and they must respect the au pair's privacy, including both their personal living space and their personal belongings.

Sponsors would be explicitly required to ensure that host family members do not photograph or create a video recording (e.g., use a nanny-cam) of an au pair without prior and ongoing consent by the au pair (proposed paragraph (k)(1)(viii)). Sponsors would also be required to ensure that host family members do not photograph or create a video recording of an au pair's private bedroom or primary bathroom while the au pair occupies them. The au pair is expected to respect the privacy of the host family children and should not take or use photographs of the children without parental consent.

The Department of State has created an exchange visitors' rights and protections trifold, which is available to all exchange visitors at: <https://j1visa.state.gov/participants/current/other-resources> (From j1visa.state.gov, navigate to Participants --> Current J-1 visa holders --> Other Resources --> Participant Brochures).

Au Pair Rematch to a New Host Family

Both Department of State and sponsor surveys indicate broad satisfaction with the au pair program among current au pairs and alumni. Most au pairs return home with positive memories

and long-lasting friendships. Difficulties arise, however, when either a host family or an au pair seeks a rematch due to irreconcilable differences. The Department of State understands that there are certain circumstances that demonstrate that an au pair should not be rematched with a new family, (e.g., putting the children at risk; habitually breaking program, sponsor, or house rules, or behaving in a manner that could bring notoriety and disrepute to the Exchange Visitor Program). However, when au pairs should be rematched due to host family behavior, the au pairs are at a disadvantage: it is often difficult for sponsors to place an au pair with a history of problems with a host family – even if the host family was the problematic party in the arrangement. These new proposed regulations help protect au pairs seeking rematch by establishing different sponsor obligations to au pairs concerning rematching and refunding depending upon whether a sponsor deems an au pair to be qualified or unqualified for rematching.

First, as discussed above, sponsors would be required to establish standard operating procedures they use to determine whether a displaced au pair is qualified for rematch. Sponsors would be required to share with new au pairs during the post-arrival orientation at the onset of their programs the criteria that they use in making such a determination. Standard procedures will prevent sponsors from declaring that an au pair that may be difficult to rematch is not qualified to be rematched. Sponsors screen both host families and au pairs for the program. It is the sponsors' responsibility to make certain that both parties have realistic expectations of what being or hosting an au pair entails. Au pairs bear significant costs, including air fare, to travel to the United States to participate in the Exchange Visitor Program. If circumstances outside their control require that the sponsor find them a new family, sponsors must have every incentive to find them a new placement in an expedient, fair and good faith manner.

Next, sponsors would be explicitly required to report the need for a rematch to the Department of State by the next business day as outlined in the paragraph (r)(2) and § 62.13(d). As also discussed above, the health, safety, and welfare of an exchange visitor is a primary

Department of State concern. Circumstances may prevent a displaced au pair from remaining in the host family home until sponsors rematch a qualified au pair or until sponsors end an au pair's program (if circumstances warrant such action) and the au pair returns home. When an au pair is removed from the host family's home, sponsors must report this to the Department of State within the next business day and pursuant to reporting requirements at paragraph (r)(2). In accordance with § 62.31(l)(1), sponsors would be required to end the au pair's program in the Student and Exchange Visitor Information System (SEVIS) if the sponsor determines that actions on the part of the au pair demonstrate their unsuitability to be placed with a new host family. Au pairs should return promptly home (using the return ticket or voucher, if they were required under sponsor policy to pay for one at the beginning of the program). Otherwise, sponsors must ensure that a return flight has been secured.

Sponsors, however, have a greater responsibility to displaced au pairs who are qualified to be rematched. As discussed above, sponsors would be required to develop standard operating procedures for rematching qualified au pairs. Sponsors are responsible for ensuring the au pairs have a safe place to live and enough money for basic living expenses while they are awaiting a rematch. The Department of State recommends that sponsors establish a maximum period during which they will attempt to rematch the au pair and after which, they will be responsible for refunding a portion of all fees the au pair paid the sponsor, and the Department of State recommends that sponsors consider refunding a portion of a foreign third-party fee at a proportion determined by the length of time they were on program. The Department of State recommends, but does not require, that sponsors pay to au pairs the refunds due from any foreign third party and include reimbursement policies in their written agreement with such parties, keeping in mind that au pairs returning home may have additional costs expenses and could benefit from a prompt and total refund. Sponsors are reminded that the failure of their third parties to make full and timely required refunds will be attributed to the sponsor. Such financial arrangements are best handled by sponsors and their third parties and should not involve the au

pairs. The Department of State seeks comment on such refund policies from sponsors and third parties, including on whether sponsors should be required to pay to au pairs the refunds due from any foreign third party.

When sponsors successfully rematch qualified au pairs, it is up to the sponsors to work out with the new and prior host families the fair allocation of non-income benefits and the educational stipend, some portion of which the first family may have already provided the departing au pair. This is a business arrangement between sponsors and each host family, that by definition, should not involve the au pair. Under the proposed rule, au pairs that have completed 75 percent of their initial program or are on six-, nine-, or 12-month extensions may not request a rematch and are not entitled to any refund of fees paid (proposed paragraph (l)(4)).

Hours

The Department of State also proposes in § 62.31(m) that the au pair's hours and weekly schedule be outlined in the Host Family Agreement. Host families and au pairs would be required to discuss proposed changes, which the sponsor must approve and document. The hours of child care for which au pairs must be compensated is the maximum number of child care hours permitted within the selected exchange program, unless the au pair has exceeded the maximum hours permitted, in which case the au pair must also be compensated for those excess hours (proposed paragraph (n)(1)). In all circumstances, the sponsor would be required to ensure the au pair is compensated for any hours worked, even if in excess of the maximum number of child care hours permitted. Even if au pairs work fewer hours, host families would be required to pay them for 31 hours for a part-time program or 40 hours for a full-time program. Au pairs deserve to know the hours of child care they are expected to provide and the amount of compensation they will receive each week. Inconsistencies in hours may lead to issues in being able to pay their weekly expenses. The 40-hour maximum is a change from the current regulations at 22 CFR 62.31(a) and (j)(1), under which one program allows au pairs to regularly provide up to 45 hours of child care a week.

The Department of State believes reducing the maximum weekly child care hours for full-time au pairs has several benefits. While providing child care is a crucial part of the au pair program, au pairs come to the United States with a primary intent to engage in cultural exchange. Reducing the weekly working hours from 45 to 40 can help to ensure that au pairs have adequate time for fulfilling the education requirement, experience socializing in the community, and time for rest and leisure, which is important for their physical and mental well-being.

By reducing their maximum weekly working hours, au pairs may be able to better manage their workload and avoid the negative effects of chronic stress. More host families are now able to work remotely or have flexible schedules, which may reduce the time they need au pairs to provide child care. Furthermore, reducing the weekly working hours of au pairs can help to improve the quality of care they provide to the host family. Some host families (or potential host families) may require more child care hours than the new regulations would allow. The number of families interested in the au pair program may decline as families may turn to other child care options. The Department of State recognizes that more Americans and potential au pairs may forego the cultural exchange opportunities available through the au pair program, but believes the reduction in maximum hours is necessary to the overall success of the program.

As discussed elsewhere, an au pair may not work hours in excess of their program's maximum-hours limit except under very limited exigent circumstances. In addition, the Department of State proposes to explicitly prohibit "unworked" hours (i.e., the difference between an au pair's actual hours worked in a week and their program's maximum-hours limit) from being carried over to the next week to exceed the program's maximum-hours limit in that next week in proposed paragraph (m)(1)(ii). In other words, each workweek stands alone. The Department of State proposes to require host families and au pairs to track daily child care hours in a sponsor-approved format.

The proposed rule would expressly prohibit au pairs from providing child care between the hours of 11:00 p.m. and 5:00 a.m. unless exigent circumstances arise (proposed paragraph

(m)(4)). The Department of State seeks comment on whether a compensation or other mechanism could similarly discourage host families from routinely failing to make alternative arrangements.

In addition to providing child care, au pairs participate in regular family activities and cultural experiences, such as going to restaurants, movies, theme parks, museums, theatre/opera, concerts, and sporting events with family members. The au pair regulations also currently require au pair sponsors to host a “family day conference” that all au pairs and host families must attend at least once annually (current 22 CFR 62.31(i)(3) and proposed paragraph (p)(4)). This proposal would amend the regulations to include the required family day conference as part of the au pair’s workday so that it will be counted for purposes of the programs’ maximum hours threshold. Relatedly, the Department of State proposes that the regulations be amended to clarify that time spent with host families in which the au pair is entirely relieved of all child care duties and voluntarily participating as a member of the family (and free to use the time for their own purposes), not as a caretaker, is not considered work hours. This would be consistent with Department of Labor guidance regarding hours worked under the FLSA for workers who provide similar services as au pairs. *See, e.g.*, 29 CFR 552.102(a), 29 CFR 785.23, and Wage and Hour Division Fact Sheet #79D (available at <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs79d.pdf>). Thus, time spent by an au pair voluntarily attending a meal, movie, or sporting event with a host family, for example, and during which the au pair is entirely relieved from all child care duties, would not be work hours.

Compensation

Stipends. The current compensation mechanism provides for a standard weekly stipend based on the current 45-hour workweek, regardless of how many hours an au pair works. The minimum weekly stipend for au pairs is currently calculated by multiplying the current federal minimum wage by 45 hours and then deducting a credit for room and board. This formula

applies across the country, without taking into account the geographically-specific variations in costs of living. Numerous states and localities have adopted minimum wage rates that exceed the federal FLSA minimum wage. Over the past few years, au pair and interest group confusion over and dissatisfaction with the current compensation framework has resulted in nation-wide litigation.

As discussed below, the Department of State has previously expressed the view that a nationwide approach to au pair compensation required a nationally uniform compensation formula based on the federal minimum wage and that the current regulations were intended to preempt and thus render inapplicable conflicting or otherwise inconsistent state and local labor laws, including state and local minimum wage and overtime pay requirements. However, the Department of State recognizes that the context in which the au pair compensation formula was established in the mid-1990s is no longer appropriate and has considered potential alternatives during its ongoing review of the category. The Department of State's review of the Au pair category of the Exchange Visitor Program has revealed that the federal minimum wage no longer provides sufficient compensation to au pairs placed in geographic areas in which growing number of states and localities have adopted state or local minimum wages that exceed the federal minimum wage. Accordingly, the Department of State is proposing to modify the regulations to require the calculation of au pairs' weekly compensation to be based on the tier of the highest of the applicable federal, state, or local minimum wage in the city/state of host family residence so that au pairs are paid at least the highest applicable minimum wage. Under the proposed rule, sponsors would require host families to identify their state and local minimum wages on their host family application, rates which the sponsor should confirm. Sponsors would also require host families to notify the sponsor if there is a change to the federal, state, or local minimum wage during the au pair's program, and if necessary, initiate an updated Host Family Agreement. The Department of State understands that some host families may not be able to afford an au pair and may be priced out of the program. Sponsor organizations could suffer

negative business consequences and revenue losses if the host family pool decreases and thus creates less demand for au pairs. Prospective au pairs may only be interested in going to destinations in the United States with higher minimum wages, contributing to diminished diversity and equity in the program. Some stakeholders may prefer a single compensation formula. Therefore, the Department of State is seeking to simplify the administration of the compensation structure and, as discussed later, seeks public comment on the delayed implementation of these and the other proposed revisions.

The Department of State is proposing to modify § 62.31(n)(4) to reflect a four-tiered au pair compensation mechanism based on the highest of the federal, state, or local minimum wage. The Department of State is not asserting that its proposed regulations would preempt state and local minimum wage and overtime pay laws as they apply to au pairs.

The Department of State proposes to adopt a national four-tiered wage formula to provide consistency in au pair compensation across geographic regions and in areas with similar local economic conditions. The proposed tiered compensation chart is as follows:

Table 1 – Proposed Compensation Tiered Chart

	Based upon the Host Family City, the highest of Federal, state, or local minimum wage:	Au pair receives:
Tier 1	\$7.25 - \$8.00 per hour	\$8 per hour
Tier 2	\$8.01 - \$12.00 per hour	\$12 per hour
Tier 3	\$12.01 - \$15.00 per hour	\$15 per hour
Tier 4	\$15.01 - \$18.00 per hour	\$18 per hour*

** Or the applicable federal, state, or local minimum hourly wage, if higher.*

A four-tiered wage formula would also ease administrative burdens in regulating or overseeing au pair compensation when the relevant minimum wage changes within a tier. The maximum hourly wage an au pair would receive is normally determined by the wage of the highest tier in the compensation chart; however, if the federal, state, or local government has a

minimum hourly wage higher than the highest hourly rate on the chart, then the au pair must be paid that higher hourly wage.

The proposed rule would provide that the Department of State will periodically, but no less than every three years (or at any shorter interval that is desirable and feasible), update the hourly pay rates in the four-tiered au pair compensation chart by *Federal Register* notice in response to changing economic conditions (e.g., if a state or locality's minimum wage exceeds the highest tier). The increase will be accomplished by adjusting the upper range of each tier by an identical amount each update cycle. For example, if the Department of State chooses in the first update cycle to increase the upper range of each tier by \$2, the chart would read as follows:

Table 2 – Hypothetical Compensation Tiered Chart Adjustment Based upon a \$2 Increase

	Based upon the Host Family City, the highest of Federal, state, or local min wage:	Au pair receives:
Tier 1	\$7.25 – \$10.00 per hour	\$10 per hour
Tier 2	\$10.01–\$14.00 per hour	\$14 per hour
Tier 3	\$14.01–\$17.00 per hour	\$17 per hour
Tier 4	\$17.01- \$20.00 per hour	\$20 per hour*

* Or the applicable federal, state, or local minimum hourly wage, if higher.

Periodically updating the chart by *Federal Register* Notice is necessary to provide the Department of State with flexibility to increase the hourly pay rates in the compensation chart due to the uncertainty of future economic conditions.

Room and Board. The new regulations at § 62.31(n)(2) address host family deductions for au pairs' room and board. Host families must calculate such deductions according to FLSA requirements. The Department of State currently permits au pair room and board deductions and proposes to maintain a policy in the proposed rule, as described in the terms below.

Under section 3(m) of the FLSA (29 U.S.C. 203(m)), a credit toward the federal minimum wages due an employee is permissible for meals, lodging, and other facilities, if certain requirements are met based on the reasonable cost or fair value of the facilities furnished. The section 3(m) credit may not exceed the “reasonable cost” or “fair value” of the facilities furnished, whichever is less. *See* 29 U.S.C. 203(m). Reasonable cost is “not more than the actual

cost to the employer of the board, lodging, or other facilities customarily furnished by him to his employees.” 29 CFR 531.3(a). Credits for room and board may be taken only when the employee actually receives the lodging and meals per 29 CFR 531.30.

The following amounts reflect permissible credits under the FLSA towards an au pair’s wages for Meals provided (per day):

Breakfast Up to 37.5% of the minimum wage = \$2.72

Lunch Up to 50.0 % of the minimum wage = \$3.63

Dinner Up to 62.5 % of the minimum wage = \$4.53

Totals: = **\$10.88 per day**

7 days X \$10.88 = **\$76.16 per week** for meals credit.

The following amount is a permissible credit under the FLSA towards an au pair’s wages for Lodging provided (per week):

Up to seven and one-half times the federal minimum wage for each week.

7.5 X \$7.25 = **\$54.38 per week** for Lodging credit.

Pursuant to 29 CFR 552.100, the total permissible credit towards an au pair’s wages per week for a full seven days of room and board actually provided is: \$76.16 (meals) + \$54.38 (lodging) = **\$130.54**.

Calculation of weekly permissible room and board credits does not depend on whether the au pair is full-time or part-time or which wage tier determines the au pair’s hourly rate or whether the au pair is paid overtime that week. The credit is determined based on the meals and lodging actually provided to the au pair during the week and is then subtracted from the wages otherwise due the au pair for that week. To the extent that a state or locality permits only a smaller credit for au pairs than permissible credits under the FLSA discussed above, the state or local law or

regulation permitting only such smaller deductions would be preempted by these regulations (proposed paragraph (t)).

Overtime. When part-time au pairs work more than 31 hours in a week but not more than 40 hours, the Department of State proposes to require au pairs to be compensated for those excess hours at the hourly rate of the applicable tier identified in paragraph (n)(4)(ii) of the regulations or the highest of the applicable federal, state, or local minimum wage, if higher. When part-time or full-time au pairs work over 40 hours in a week, the Department of State proposes to require au pairs shall be compensated for those excess hours at the hourly rate of the applicable tier identified in paragraph (n)(4)(ii) of the regulations or the highest of the applicable federal, state, or local minimum wage if higher, and they must also be paid any overtime premium due under applicable federal, state, or local law (proposed paragraph (n)(4)(iv)). In addition, the proposed rule would require au pairs must be paid any other overtime premiums due under applicable federal, state, or local law for other hours worked. These regulations would not preempt state and local laws regarding overtime pay as host families are discouraged from requiring au pairs to work additional hours in contravention of program policies and regulatory requirements.

The Department of State encourages public comment on this alternative calculation of au pairs' compensation and welcomes other proposals of alternative calculations that maintain a uniform national stipend formula that accommodates variations in federal, state, and local minimum wage rates. Any viable proposal must remain true to the core objective of all international exchanges conducted pursuant to the Fulbright-Hays Act, i.e., to serve as a cultural program designed to meet the crucial foreign policy goal of enhancing mutual understanding between people of our nation and other nations.

Assuming adherence to the programs' maximum hours provisions, the regulations would continue to not permit week-to-week variation in the stipend amount (although there may be week-to-week variation in the credit taken for lodging and meals actually provided) since, as discussed above, stipends are based on the maximum weekly hours established for the part-time

and full-time program options. However, maintenance of a weekly record of hours, payment, and deductions would be required to provide sponsors with documentation to demonstrate that host families are complying with important regulatory requirements. Sponsors would be required to review such documentation to confirm that au pairs are working only the required hours, are provided their paid time off, and are charged for in-kind benefits (e.g., gym membership, cell phones) only as the au pair and host family agreed in the Host Family Agreement and only as permitted by paragraph (n)(3) of the proposed regulations. The Department of State seeks comment on this proposed method of documenting that host families do not require au pairs to exceed the maximum number of child care hours each day or week and that they compensate au pairs (with income and non-income benefits, e.g., leave) in accordance with the regulations.

The proposed rule would require sponsors to ensure that host families provide au pairs copies of this tracking document on a weekly basis throughout the exchange program (paragraph (m)(6)(ii)). Further, sponsor organizations would be required to collect and review copies of the timesheets each month. Such review may be conducted by field or headquarters staff, and sponsors are reminded of their obligation to retain copies of all weekly documents timesheets for three years following the end of the au pair's program in accordance with § 62.10(g).

Educational Component

Because completion of this portion of an au pair program is critical for achieving the objectives of the Fulbright-Hays Act, the Department of State proposes four alternative types of educational programs to provide more flexibility to facilitate au pairs' pursuit of this requirement. The Department of State seeks comment on these or other similar alternatives, especially with respect to the required number of hours for each option and whether the new, higher educational stipend is sufficient given current and perhaps geographically-dependent costs of education.

The regulations retain the traditional academic option currently set forth at 62.31(k) for those au pairs who are seeking the opportunity to advance their academic education while on program by obtaining a minimum of six semester hours at an accredited U.S. academic institution. It should be noted that the academic option being proposed in paragraph (o)(1) is the only one that may have a virtual component. Au pairs would have the option of attending in-person classes or taking a subset of classes online during their program. In-person exchanges are still a critical component of the Exchange Visitor Program and ensure that au pairs have a chance to be exposed to Americans outside of the host family. Thus, the Department of State proposes, under paragraph (o)(1)(i)(A), to permit au pairs pursuing the academic option to complete no more than one third of the required coursework online if local circumstances permit.

Not all individuals have academic goals, however, and the interests of some au pairs may be better met through continuing education programs. Accordingly, the Department of State has proposed to allow coursework at continuing educational institutions (§ 62.31(o)(2)) as sufficient for meeting the educational component requirement.

In the past, the Department of State has rejected au pair attendance at, for example, weekend courses at a campus setting that are attended exclusively by au pairs. While this option allows au pairs to interact with one another, it does not provide the opportunity to mingle primarily with U.S. students. However, after further consideration, the Department of State recognizes that courses that are customized for the au pair community offer other distinct benefits. Sponsors and the academic institutions with which they jointly design such courses have the opportunity to develop a curriculum that highlights U.S. history and values, e.g., rule of law, civil rights, and democratic values. Such concentrated exposure to the U.S. culture can provide au pairs with a relevant and focused cultural and historical overview that is not available through traditional academic and educational institutions. Accordingly, the Department of State proposes and seeks comment on this option (§ 62.31(o)(3)).

Depending upon the geographic location where an au pair is placed, there may be limited options for academic and/or continuing education opportunities. As volunteerism is a U.S. value, the Department of State offers an option that allows au pairs to fulfill half their educational requirement by volunteering with a tax-exempt nonprofit organization as described in section 501(c)(3) of the U.S. Internal Revenue Code (§ 62.31(o)(4)). This provides additional flexibility from both a time perspective and by accommodating the various interests of exchange visitors. The other half of the component may be met by pursuing either academic coursework or continuing education classes. The Department of State seeks comments on all these options and welcomes comments on additional ways of meeting the educational component requirement.

The Department of State recognizes that the cost of education has increased significantly over the years and that an increase in the educational stipend amount is long overdue. The current regulations require host families to pay \$500 towards the au pair's six semester hours of education. The Department of State is proposing to increase the stipend paid by host families to \$1,200. The review of several two-year or community colleges averaged \$130 per credit hour x six credit hours, plus cost of registration, books, etc. The Department of State seeks comment as to whether the increase to \$1,200 is sufficient to cover most of the educational expense au pairs will incur (§ 62.31(o)(6)).² Host families may pay the stipend either directly to the au pair or to the appropriate institution. As discussed above, in case of a rematch, the Department of State expects sponsors to arrange the equitable distribution of the stipend cost between the host families without involving the au pair. Sponsors must also be prepared to ensure that an au pair that is part-way through a course and is rematched to a new geographical location has sufficient resources to reenroll in classes at the new locale.

² <https://educationdata.org/cost-of-a-college-class-or-credit-hour> (suggesting the average cost of a credit hour at a community college or in-district school is \$141 per credit hour); <https://www.bestcolleges.com/research/college-cost-per-credit-hour> ("Two-year public schools, or community colleges, charge the least at just under \$120 per credit hour.").

As with paid time off and sick leave, the number of education hours au pairs must complete during any extension period would vary, as they do now, based upon the length of the program extension. The Department of State seeks comment on the four options, the required compensation amounts, and the number of hours that should be required for extensions (recognizing that extension periods may not always line up with institutions' course schedules). The Department of State intends for the hour commitment among the four options to be substantially the same and seeks comment on whether its proposed hourly requirements achieve this goal.

Reporting

The Department of State proposes to require third party vetting and reporting similar to that currently required under the Summer Work Travel program. Au pair sponsors would be required to vet all foreign third parties as defined in § 62.2 (e.g., overseas agents or partners) that assist them in fulfilling the program responsibilities under § 62.10 that may be conducted outside the United States. Such vetting would include reviewing and documenting previous bankruptcies or pending legal actions, summaries of the entities' prior J-1 Exchange Visitor visa experience, and copies of sponsor-approved advertising materials. After sponsors have successfully vetted foreign third parties, they would be required to provide the Department of State with that third party's name and contact information (i.e., telephone number, e-mail address, street address, city address, point of contact, and website address) within 30 days of execution of the agreement by providing the Department of State with a Foreign Entity Report. The sponsor also must provide the Department of State with updated contact information for its foreign third party within 30 days after receiving notice of any change in that party's contact information. Although sponsors do not need to work with foreign third parties, they may not work with those foreign third parties that are not included in the Foreign Entity Report. If any material information (e.g., contact information, financial status, relationship with sponsor) changes, sponsors must provide this information to the Department of State within 30 days.

The foreign third parties' initial outreach to potential program applicants sets the stage for participants' expectations about the au pair program. Sponsors must be aware of what the foreign third parties are posting on web sites, communicating through social media, and distributing in printed materials to ensure the information conforms to the purpose and intent of the program and meets regulatory requirements. It is important, for example, that the cultural exchange aspects of the program are accentuated, and that au pair applicants' expectations about hours and compensation are realistic.

In addition, to better manage expectations and provide au pair program applicants and selected au pairs with greater transparency regarding the fees they may be charged to participate in the program, the Department of State is adding a requirement that sponsors submit a list of all fees, including recruitment fees or associated costs, that either they or their foreign third parties may charge applicants to apply for and participate in the program. Such list must describe the services associated with each fee and clarify whether the fees are estimated or fixed, refundable or non-refundable, and mandatory or optional.

In 2014, the Department of State extended the management review requirement to other categories of the Exchange Visitor Program. The Department of State is keeping the current regulatory language requiring a report by a certified public accountant until § 62.15(b) of subpart A (General Provisions) is updated. The only proposed change is to add language in which the Department of State will release a schedule approved by the Department of State for submission of the report.

Preservation of Additional Features of the Au Pair Category

As previously explained, the Exchange Visitor Program is first and foremost a diplomatic tool that supports U.S. foreign policy objectives. Accordingly, a number of program features set forth in the regulations are key to the program's operation as a diplomatic tool. Given the Department of State's exercise of its discretion under the Fulbright-Hays Act in arriving at this balance, the Department of State is also proposing to amend the federal au pair regulations to

provide explicitly that the regulations establish the exclusive requirements applicable to host families and sponsors on certain matters and may not be supplemented by state or local law. As proposed in paragraph (t)(1), these key program features must not be supplemented or contravened by state or local law, namely: (a) au pair selection; (b) au pair placement; (c) hours and compensation (except for state and local minimum wage and overtime pay requirements, as described below); (d) unemployment insurance tax and employment training taxes; (e) minimum time off and paid time off and sick leave; and, (f) educational component. These elements all work in concert to create a program that meets foreign policy goals of establishing mutual understanding through cultural exchange and emphasizes the value of the au pair's integration with an American family even when not providing child care. The Department of State also proposes in paragraph (t)(2) that regulatory framework provided under this section shall preempt any state or local law that, in the Department of State's view, otherwise poses an obstacle to the realization of the objectives of the Au pair category of the Exchange Visitor Program.

Notwithstanding the foregoing, state and local minimum wage and overtime pay requirements shall apply to au pairs where applicable and shall not be deemed to be an obstacle to achievement of the objectives of the Au pair category of the Exchange Visitor Program.

Au pair programs operate in the field of foreign affairs, an area that has long been reserved to the U.S. Federal Government. In 1985, and by statute, Congress authorized the Director of the U.S. Information Agency to provide for au pair programs. In 1994, Congress directed the U.S. Information Agency to continue the au pair program within the Exchange Visitor Program and to prescribe regulations governing it (*see* Pub. L. 103-415, § 1, 108 Stat. 4299, 4302 (1994)). Congress has since further extended the program and made it permanent in 1997 (*see* Pub. L. 105-48, 111 Stat. 1165 (1997)). In so doing, Congress believed this distinctly federal program would further the United States' objectives in the areas of foreign relations and international diplomacy, two areas "inherently federal in character." *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 374 (2001). The Exchange Visitor Program "originates from, is governed by, and

terminates according to federal law.” *Id.* When the Fulbright-Hays Act authorized educational and cultural exchanges, the Act also created “a new nonimmigrant visa, category (J), to serve solely the purposes of the Mutual Educational and Cultural Exchange Act of 1961.” H. R. Rep. No. 1197, at 17 (1961) (Conf. Rep.). The federal regulations provide the exclusive terms under which an au pair exchange visitor may enter the country, as the “[p]ower to regulate immigration is unquestionably exclusively a federal power.” *De Canas v. Bica*, 424 U.S. 351, 354 (1976).

The Department of State is proposing to expressly preempt state and local law in the areas of au pair selection, au pair placement, and the educational component. Congress has authorized the Department to create a federal international exchange program that brings young adults into the country for an educational and cultural experience. The Department of State balances the needs of au pairs, sponsors, and host families and their communities in these regulations when it determines the eligibility and placement terms that best advance the foreign policy and diplomatic objectives of the federal government. Contrary state rules in these areas would upend that well-considered approach.

In addition, the Department of State is proposing to preempt state and local law in the areas of hours and compensation (except for state and local minimum wage and overtime pay requirements, as described below) and minimum time off and paid time off vacation and sick leave. As discussed *supra*, the Department of State has previously expressed the view that a nationwide approach to au pair compensation required a nationally uniform compensation formula. The Department of State recognizes that the federal minimum wage no longer provides sufficient compensation to au pairs, and that a significant number of states and localities have adopted state or local minimum wages that exceed the federal minimum wage. Accordingly, the Department of State is proposing to modify the regulations to require the calculation of au pairs’ weekly compensation to be based on the tier of the highest of the applicable federal, state, or local minimum wage in the city/state of host family residence so that au pairs are paid at least the highest applicable minimum wage. The Department of State also proposes to reduce maximum

weekly hours of child care to forty hours and remove the overtime option, with the exception of limited exigent circumstances. State and local law related to room and board deductions would be preempted to preserve a uniform compensation scheme. With this federal structure in place, the au pair program would continue to operate on a nationwide uniform basis for hours and compensation while not preempting state and local minimum wage and overtime pay requirements. The Department of State would not preempt state and local laws regarding overtime pay as host families are discouraged from requiring au pairs to work additional hours in contravention of program policies and regulatory requirements.

Under paragraph (t)(1)(d), the Department of State proposes to preempt all state unemployment insurance taxes and the employment training taxes described below. In addition to carving out a new visa category, the Fulbright-Hays Act amended the Internal Revenue Code relating to the definition of employment for purposes of Federal Insurance Contributions Act (FICA) contributions and the Federal Unemployment Tax Act. Section 110(e) of the Fulbright-Hays Act exempts exchange visitors from paying FICA taxes on services authorized by the program, since they are “temporarily” in the United States and “scarcely have any expectation of realizing benefits from such a tax payment.” *See* H. R. Rep. No. 1197, at 19. Section 110(f) removes the obligation of employers to pay Federal unemployment tax on certain authorized exchange visitor services.³ The Conference Report notes that “exchange visitors could rarely, if ever, be in a position to benefit from unemployment compensation coverage.” *Id.* Congress

³ The exemptions from FICA taxes and Federal unemployment tax under section 110 of the Fulbright-Hays Act were codified in sections 3121(b)(19) and 3306(c)(19) of the Internal Revenue Code, respectively. These exemptions apply to the extent that the exchange visitors are nonresident aliens. An exchange visitor who has previously been in the United States on temporary nonimmigrant status as a student, teacher, trainee, or researcher under subparagraph (F), (J), (M), or (Q) of 8 U.S.C. 1101(a)(15) could be a resident alien during their current stay in the United States and, therefore, may be subject to FICA taxes and Federal unemployment tax if their annual wages exceed the applicable dollar threshold. *See* 26 U.S.C. 3121(b)(19), 3306(c)(19), and 7701(b), and 26 CFR 31.3121(b)(19)-1(a)(1) and 31.3306(c)(18)-1(a)(1).

crafted a nuanced approach to exchange programs to further U.S. foreign policy objectives, distinguishing exchange visitor programs from temporary employment programs.

Under paragraph (t)(1)(d), the Department of State proposes to preempt all state unemployment insurance taxes and the employment training taxes described below. Under Federal law, compensation paid to au pairs is often deemed to be exempt from the requirement that employers pay Federal unemployment taxes on their wages. The exact conditions for determining when the wages may be subject to Federal unemployment tax can be found by consulting the IRS website on au pairs, in addition to Publication 926, Household Employer's Tax Guide.

In most cases, au pairs, who are between the age of 18 to 26, come to the United States to participate for the first time in an au pair program and are required to return home once they successfully complete the program. As the au pair program does not provide work authorization after the program ends, an au pair would not be eligible for unemployment benefits unless they obtained other authorization to work in the United States beyond the au pair program, and payment of unemployment taxes on these wages would not be the responsibility of the au pair's host family. Therefore, the Department of State does not expect host families to be required to pay state or local unemployment insurance taxes or the employment training taxes described below.

Unemployment insurance is a joint state-federal program that provides cash benefits to eligible workers. States have various types of unemployment tax requirements that may require employers to pay a payroll tax, also known as a State Unemployment Tax Act (SUTA) tax. States use funds to pay out unemployment insurance benefits to unemployed workers. States might also refer to SUTA tax as State unemployment insurance, SUI tax, or Reemployment tax (e.g., Florida). In most states, unemployment insurance is an employer-only tax. However, employees in certain states (e.g., Alaska, New Jersey, and Pennsylvania) must also pay an unemployment insurance tax.

Some states have an employment training tax, which generally provides funds to train employees in targeted industries, teach workers new skills, and promote businesses to make businesses more competitive. Like unemployment insurance, employment training taxes are paid by employers and businesses. States refer to employment training taxes using different terms, such as an Employment & Training Investment Assessment (e.g., Texas). In any case, the assessment is imposed on each employer as a percentage of wages paid by an employer. As discussed above, au pairs do not have general work authorization, and once their exchange program ends, are expected to return home. Therefore, employment training taxes do little to protect or benefit au pairs. In addition, the Department of State is aware of the cumulative costs of this rulemaking on prospective host families and seeks to broaden the pool of interested host families as much as possible. The Department of State is concerned about burdening au pair programs with the payment of additional general welfare taxes so as to further restrict affordability of the program to the most wealthy host families. For these reasons, the Department of State proposes to expressly preempt state or local laws related to employment training taxes.

If state and local laws interfere with the fulfillment of the au pair program in a capacity that frustrates Congressional objectives and the President's foreign affairs prerogatives, the Department of State may choose to regulate to reflect the preemption of state and local law. The Department of State proposes this rulemaking to affirm the exclusivity of Federal regulation over the au pair program in certain areas expressly identified in proposed paragraph (t) that could frustrate the primacy of the Federal Government in the conduct of foreign affairs and immigration if such matters were regulated by the States.

In doing so, the proposed rule is consistent with the ruling in *Capron v. Office of the Attorney General of the Commonwealth of Massachusetts*, 944 F.3d 9 (1st Cir. 2019). The First Circuit noted in the *Capron* decision that the Department of State "would be free to preempt . . . [the relevant] state laws now by revising the regulations." *Id.* at 44.

In that case, the Department of State advanced its view that the existing Federal au pair regulations already preempt state and local laws pertaining to the terms of employment in the au pair program. The au pair program is a creation of Federal law and operates in the spheres of foreign affairs and immigration, two areas that have been exclusively reserved to the Federal Government. The Department of State argued that the requirement that Responsible Officers of programs with an employment component have a “detailed knowledge of federal, state, and local laws pertaining to employment” did not indicate otherwise. The Department of State has an important policy interest in ensuring that applicable state or local law with respect to matters not addressed by Federal regulations continues to protect participants in the program. While *Capron* dealt with whether Federal regulations preempt Massachusetts from requiring host families to comply with various state laws, the Department of State believes its arguments would have applied with equal, if not greater, force in the context of preemption of state law directed at sponsors. The Department of State argued that the regulations provide a comprehensive framework for the terms of employment in the program, leaving no room for state law whether applied to host families or sponsors.

Nevertheless, the First Circuit decision in *Capron* concluded that Federal au pair regulations do not, as currently written, preempt state and local law, and this has led to a great deal of confusion among au pair sponsor organizations, au pairs, host families, and state/local governments about the relationship between the Federal au pair regulations and state and local law. Indeed, this ruling has caused an immediate negative impact on the au pair program. Families inviting an au pair into their home to share a cultural exchange experience incur significant personal and financial burdens; predictable program requirements are necessary for families to make this decision. Uncertainty about whether Federal or State/local law requirements apply, or how these provisions apply simultaneously, has made it extremely difficult for the families to anticipate their responsibilities, costs, administrative burdens, and ultimately their ability to host an au pair. The proliferation of additional lawsuits concerning the

au pair program in the wake of the *Capron* decision has only added to this uncertainty. In addition, families that were adhering to the Federal regulations in good faith may now find themselves accused of violating state and local laws and facing legal exposure.

In addition to the minimum wage issue discussed above, the proposed rule would clarify the calculation of the room and board deduction under the FLSA. The requirements that an au pair live with an American host family and participate directly in home life, and the availability of the deduction to the host family, are key features of the au pair program because they facilitate the au pair's participation in daily family life, entertainment, and meals. Similarly, in order to help build strong relationships with their American host families, au pairs are not permitted under the au pair regulations to provide child care for multiple families (proposed in paragraph (e)(1)(v)) or work for any other employer, whereas states/localities may permit a domestic worker to work for multiple employers. The Federal regulations for the au pair program offer other nationwide benefits and protections to au pairs including the requirement that au pairs be given certain time off and two weeks of paid time off.

Under the First Circuit ruling in *Capron*, it is unclear to host families what obligations they have that extend beyond those provided in the current au pair regulations. As a result, sponsors have reported a decrease in prospective host families interested in participating in the program. One sponsor notified the Department of State that they no longer would place au pairs or run their exchange program in the state of Massachusetts. Data from the SEVIS reports that there were 1,457 au pairs placed in Massachusetts in 2019. The number of au pairs has declined each year since the ruling. In 2021 and 2022, there were 528 and 454 au pairs respectively placed in Massachusetts. The prospect of litigation in other jurisdictions and interest in new state and local law measures to regulate the terms of au pair employment has dramatically increased. The Department of State believes it is urgent to bring clarity to this issue by promulgating this rulemaking, and thereby preserving a nationwide approach to the au pair program and facilitating a cultural exchange program experience that meets U.S. foreign policy objectives.

Severability

The Department of State proposes to include a severability clause in § 62.31(u), such that if any provision is held invalid or unenforceable, it would not affect the remainder of the rule. The Department of State believes that the provisions of this rulemaking are necessary to further the foreign affairs and diplomacy purposes of the Fulbright-Hays Act. To the extent that any provision is held invalid or unenforceable, the Department of State intends for the remaining provisions to continue to operate and protect au pairs, sponsors, and other stakeholders in the au pair program.

Proposed § 62.31(u) would establish that in the event that any provision of this section is held invalid as applied to any person or circumstance, the Department of State intends for such provision to be construed to have maximum effect as applied to other persons or circumstances to the extent permitted under law. If such provision is deemed invalid and unenforceable in any circumstance, the Department of State intends for such provision to be severable from the remaining provisions of this section.

Reliance Interests

The Department of State recognizes that sponsors, host families, au pairs, and their communities may have reliance interests of varying degrees in the current au pair program. The Department of State understands that sponsors may have relied upon the current regulations in deciding to seek designation to conduct exchange programs; in hiring staff and recruiting potential exchange visitors; and in making other business choices. Au pair sponsors invest a significant amount of time and resources into recruiting and selecting host families and au pairs. Any sudden changes to the program regulations could disrupt this investment and cause significant uncertainty and stress for sponsors, host families, and au pairs. The Department of State is aware that this rulemaking may decrease the number of au pairs participating in sponsor programs, but the Department believes that the benefits of reducing confusion about the relationship between the Federal au pair regulations and state and local law will help to increase

participation. Further, the rulemaking includes a number of safeguards for au pairs and host families that may also increase participation and ultimately benefit sponsors. Nonetheless, as discussed below, the Department of State proposes to delay the effective date of the final rule for approximately six months to allow sponsors time to reevaluate their programs before the new regulations go into effect.

The Department of State has also considered the effect of this proposed rule on families that are currently hosting au pairs. Host families may have decided to participate in an exchange program under the existing rules and unexpectedly face new costs if subject to the new regulations immediately. The effects on host families will include paying more than twice as much in au pair compensation as they currently do in some localities. In consideration of these reliance interests, the Department of State proposes to “grandfather” au pairs (and their host families) on exchange programs that began prior to the final rule’s effective date, (i.e., 180 days from publication of the final rule). Such exchange programs will not be subject to the new rules for the duration of the initial one-year program, or for up to one year if the au pair is currently on an extension. Current host families that intended to extend participation of their current au pair will be subject to the new regulations 180 days after publication of the final rule. Some host families may choose not to extend their au pair’s program as a result. The Department of State nonetheless believes the benefits of greater protections for au pairs and host families will lead to an improvement in the public diplomacy benefits of the program. The Department of State requests comments on its consideration of the reliance interests of stakeholders.

Implementation. Given the significant impact the proposed rule will have on host families and au pairs that have already signed a Host Family Agreement, the Department of State proposes to “grandfather” certain au pair programs that begin prior to the effective date of 180 days from date of publication of the final rule. If the Department finalizes all or part of this proposal, au pair exchange programs with a Program Begin Date on the DS-2019 prior to 180 days from date of publication of the final rule are subject to the requirements of 22 CFR 62.31 in

effect at the time of the Program Begin Date on Form DS-2019. Any extensions of programs authorized prior to the effective date of 180 days from date of publication of the final rule are also subject to the requirements of 22 CFR 62.31 in effect at the time of the Program Begin Date. Any program extensions authorized on or after the effective date of 180 days from date of publication of the final rule would be subject to the requirements set forth in this section.

The Department of State also seeks comment on its proposal to delay the effective date of the final rule for 180 days upon publication of a final rule; as well as comment on any provisions of proposed § 62.31 that should be implemented sooner, (e.g., within 30 days of publication). By delaying implementation of certain requirements for approximately six months, sponsors would have time to adjust and plan for any changes that may affect their programs. Secondly, delaying the implementation of some regulatory provisions in new au pair regulations for approximately six months would provide sponsors with an opportunity to evaluate the impact of the proposed changes on their own exchange programs. This time would allow sponsors to make any necessary adjustments or changes to their program models to ensure compliance with the new regulations. Finally, delaying implementation of the new au pair regulations for approximately six months would ensure that current and future au pairs have a clear understanding of the program requirements and expectations, and that sponsors have time to communicate these changes effectively to host families and au pairs. This temporary delay would help to minimize confusion and ensure that the au pair program continues to provide high-quality child care and educational and cultural exchange experiences for families and au pairs alike.

Summary of NPRM

In summary, the Department of State would modernize the au pair program and increase au pair protections by proposing the following new provisions:

Section 62.31(a). The purpose paragraph introduces a part-time program (24-31 hours of child care per week) and a full-time program (32-40 hours per week).

Section 62.31(c). As part of the program conditions, sponsors would be required to establish new standard operating procedures.

Section 62.31(d). The au pair eligibility paragraph would require sponsors to ensure that au pairs are interviewed by both the sponsor and the host family. Au pairs would also be required to have a driver's license from their home country to demonstrate at least one year of experience driving and be able to obtain a license in the host family jurisdiction, if required.

Section 62.31(e). Sponsors would be required to confirm a host family placement prior to the au pair's departure from the home country by obtaining the signatures of the host family and au pair in a Host Family Agreement.

Section 62.31(f). The au pair orientation provision would require sponsors to provide au pairs with pre-arrival information that covers compensation and benefits (including in-kind benefits); allowable deductions; maximum work hours; time off; child care duties; documenting child care hours; driving expectations; and, requirements for paying state and Federal taxes.

Section 62.31(g). The au pair training paragraph requires sponsors to provide au pairs with child safety instruction and child development instruction, an online driving course, and information covering state and local driving laws including safety information.

Section 62.31(h). The host family eligibility paragraph requires sponsors to ensure that host families are prepared to speak English daily and will not reside outside the U.S. for more than 30 days. Sponsors must also conduct criminal background checks on all host family household members 18 years of age or older.

Section 62.31(i). The host family orientation provision would require sponsors to provide host families a copy of the Host Family Agreement, information on how to document weekly child care hours, and a print-out of the current page from the Internal Revenue Service's website on the topic of "Taxation of Nonresident Aliens."

Section 62.31(j). This paragraph would formalize the current au pair and host family agreement and require both the au pair and host family to sign prior to the au pair departing from

their home country, as well as identify an itemized list of fees (costs to host family and au pair); duties; weekly schedule; compensation; time off for weekends and vacation; educational component; room; in-kind benefits (e.g., cell phone, gym membership, car for personal use); and, appropriate and inappropriate au pair duties.

Section 62.31(k). “Au pair limitations and protections” is a new provision under which sponsors would require host families to provide a home environment free from sexual harassment, exploitation, or any other form of abuse; to not use a nanny cam or take photos without prior and ongoing consent; to ensure the au pair is only responsible for the host family children; and, to provide the au pair 80 hours of paid time off and 56 hours of sick leave.

Section 62.31(l). Rematch would require sponsors to report when an au pair is removed from the host family home, determine the au pair suitability to continue the program, and make an expedient, fair and good faith effort to find a new host family placement for suitable au pairs. Sponsors would be required to refund au pairs if unable to find a suitable rematch.

Section 62.31(m). The “Hours” paragraph would require whether the au pair will be participating in a part-time or full-time program to be stated in the Host Family Agreement, prohibit overtime for child care except in limited exigent circumstances, and define when an au pair is providing child care.

Section 62.31(n). The compensation provision would introduce a new four-tiered compensation chart based on the highest of the Federal, State, and local minimum wage. It further explains that au pairs would be compensated for the maximum number of hours in the part-time or full-time program and the extent to which deductions are permissible for room & board and in-kind benefits.

Section 62.31(o). The educational component provision would be amended to eliminate the Educare program and offer new options in conjunction with in-person classes (e.g., online class, continuing education classes, and volunteering in their community).

Section 62.31(r). The reporting requirements paragraph would add new requirements for sponsors to provide foreign agent information and price lists and an annual itemized program costs/fees list.

Section 62.31(t). “Relationship to state and local laws” is a new provision that would provide that regulations in this section provide the exclusive requirements in certain matters and may not be supplemented by state or local law except as expressly provided therein.

REGULATORY ANALYSIS

Administrative Procedure Act

The Department of State has historically determined that rulemakings regarding the Exchange Visitor Program involve a foreign affairs function (5 U.S.C. 553(a)) of the United States.⁴ However, due to Department of State’s interest in seeking public comment on this rulemaking, the Department is soliciting comments during a 60-day comment period, to which it will respond in a final rule, should the Department of State choose to finalize all or part of this proposal.

Unfunded Mandates Reform Act of 1995

This regulation will not result in the expenditure by state, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million in any one year. Further, since the regulatory requirements in the proposed rule will not significantly or uniquely affect small governments, no further action by the Department of State is required under the Unfunded Mandates Reform Act of 1995.

Executive Order 13175 – Consultation and Coordination with Indian Tribal Governments:

⁴ Foreign governments seek to promote the ability of their foreign nationals to visit and study in the United States, and the Department of State establishes modified exchange programs pursuant to memoranda of understanding with foreign governments, based on the foreign policy needs of the United States. This practice reflects the flexibility needed for a program whose purpose is to promote the interests of the United States abroad and further “peaceful relations between the United States and the other countries of the world.” 22 U.S.C. 2451. In connection with that purpose, a major purpose of this rulemaking is to protect the health, safety, and welfare of foreign nationals while they are in the United States on their programs. Failure to protect the health, safety and welfare of these foreign nationals can have direct and substantial adverse effects on the foreign affairs of the United States.

The Department of State has determined that this regulation will not have Tribal implications, will not impose substantial direct compliance costs on Indian Tribal governments, and will not preempt Tribal law. Accordingly, the requirements of Executive Order 13175 do not apply to this rulemaking.

Regulatory Flexibility Act/Executive Order 13272: Small Business Impacts

As noted above in the APA section, the Department of State has historically determined that rulemakings regarding the Exchange Visitor Program involve a foreign affairs function (5 U.S.C. 553(a)) of the United States. The Department of State voluntarily provides the following information regarding the proposed rule's impact on small businesses.

This regulation will affect the operations of fourteen sponsors designated by the Department of State to conduct exchange programs in the Au pair category. Each organization applied to the Department of State to become a designated sponsor of the au pair program, and as part of the ongoing administration, sponsors supply their latest financial year end statements every two years as part of an application for redesignation. Of the fourteen sponsors designated in the Au pair category of the Exchange Visitor Program in 2019, all were small sponsors with annual revenues from the J-visa au pair program of approximately \$15 million or less. In one recent year, 21,500 foreign nationals started new programs in the Au pair category. As the au pair program is currently under a new sponsor moratorium and a cap on the number of au pairs annually, we expect a similar number of au pairs to begin 12-month long exchange programs in the coming years.

Many variable costs do not have a significant impact on small entities because they are proportionate to the sponsors' program size, and thus, revenues. For example, one au pair sponsor only sponsors six au pairs annually and the largest sponsor hosts approximately 10,500 au pairs annually.

Sponsors will incur the following range of costs:

- Customize the Host Family Agreement for each au pair placement. The cost to input the host family specific information into a contract would take one employee one hour at a cost of \$72.97 per placement x 21,500 au pair placement = a total aggregate cost of \$1,568,855. The estimated range of costs for sponsors is \$438 for the sponsor with the smallest program to \$766,185 for the sponsor with the largest program.
- Prepare placement-specific information packages for au pairs and host families. The Department of State believes that a GS-9 level staff member could compile, collect, and distribute electronically the required information in one hour per placement, or \$31.50. For all 21,500 placements, the aggregate cost would be \$677,250. The estimated range of costs for sponsors is \$189 for the sponsor with the smallest program to \$330,750 for the sponsor with the largest program.
- Vet foreign entity contracts. The Department of State estimates that it will require sponsor staff at the GS-9 level two hours to vet each foreign entity for a total of \$71.62 per foreign entity. These costs will vary significantly among sponsors, based upon their recruiting patterns. The cost to the sponsor with one foreign entity will be \$71.62. The cost to the sponsor with 51 foreign entities will be \$3,652.62. For the entire sponsor community, it will cost \$27,000.74 to annually vet all 377 foreign entities.
- Updating standard operating procedures to include the new requirements under program conditions – to update the seven standard operating procedures by one employee at \$72.97 per hour, it would cost each sponsor \$4,086 to formalize these standard operating procedures. The total cost for all sponsors would be \$57,208.
- Updating the existing host family and foreign entity contract templates. It would take one employee at \$72.97 per hour a total of 22 hours for a total of \$1,605 per template.
- Updating sponsor orientation materials one-time based on new regulatory requirements. These additional fixed costs would take one employee at \$72.97 per hour a total of 40 hours for a total of \$2,919.

Alternatives Considered. The Department of State considered not issuing a proposed rule, but small entities (i.e., sponsors) themselves have asked the Department of State for regulatory clarification about how the Federal regulation interacts with state and local law. The confusion currently created in the au pair program, once eliminated, may reduce costs for sponsors because they can make better business decisions about operations.

The au pair regulations have not been updated since 2008, and there were several program administrative areas, such as au pair protections and increased educational stipends, that needed to be updated to modernize the au pair program and ensure that the program meets the purposes of the Exchange Visitor Program.

Executive Order 12866

The Department of State has submitted this proposed rule to the Office of Information and Regulatory Affairs (OIRA), and OIRA has determined that this is an economically significant regulatory action per Executive Order 12866.

The Department of State asserts that the foreign policy benefits from preserving this nationwide au pair program, providing for the safety of au pairs, and ensuring accountability of all stakeholders in the au pair program outweigh any additional costs imposed by this rulemaking. This section outlines new costs for the program. The costs of the new regulations are comprised of fixed and variable costs.

For the cost calculations, the Department of State uses the hourly wage of mid-range GS-9 Federal workers for support services and the hourly wage of mid-range GS-14 Federal workers for those tasks requiring additional experience, such as writing standard operating procedures. The Department of State adds 40% of the GS-9 hourly wage to the base rate to include the cost of benefits (or $\$22.50 \times 140\% = \31.50). Similarly, the Department of State calculates the GS-14 hourly wage as $\$52.12 + \$20.85 = \$72.97$.

Fixed Costs

This regulation will impose total estimated new fixed costs of \$8,610 for each of the fourteen designated au pair sponsors, or \$120,540 in the aggregate. The Department of State estimates the size of the programs of the fourteen sponsors ranges from six exchange visitors to 10,500 exchange visitors starting new programs each year. The Department of State does not calculate additional costs to host families for au pairs who extend their programs as extending au pairs remain with their host families and most of the variable costs are associated with evaluating the suitability of the original au pair placement. The fixed costs are those that each sponsor must incur regardless of program size. Almost half the fixed costs will be incurred formalizing the seven standard operating procedures: (i) training of headquarters and field staff; (ii) contingency plans for au pairs removed from a host family; (iii) covering educational costs that host families fail to pay; (iv) allocation of non-income related cost of paid time off and sick leave; (v) rematching qualified au pairs to new placements; (vi) establish guidelines and circumstances for au pair to be removed from program; and (vii) process for responding and reporting to issues, concerns, or emergencies. As discussed below under “Program conditions”, to update the seven standard operating procedures by one employee at \$72.97 per hour, it would cost each sponsor \$4,086 to formalize these standard operating procedures. The total cost for all sponsors would be \$57,208.

Other fixed costs include updating existing host family and foreign entity contracts, as well as updating sponsor orientation materials. These additional fixed costs would take one employee at \$72.97 per hour a total of 22 hours for a total of \$1,605 per template and 40 hours to update orientation templates for a total of \$2,919. Total fixed costs are $\$4,086 + \$4,524 = \$8,610$ per sponsor, or \$120,540 for all fourteen sponsors.

Variable Costs

The Department of State estimates that the variable costs for sponsors per au pair placement will increase by \$195. This includes the costs of criminal background checks for each adult in the host family home (average two per home) and to customize the Host Family Agreement and

orientation materials for each placement. In the aggregate, the Department of State estimates variable costs to be \$2,047,500 (10,500 au pairs x \$195) for the largest sponsor. These costs do not have a significant impact on small entities because they are proportionate to the sponsors' program size, and thus, revenues. Sponsors will incur costs to customize Host Family Agreements to individual placements and to prepare placement-specific information packages for au pairs and host families. The smallest sponsor with six au pairs will have a variable cost of \$1,170 (6 au pairs x \$195). Another variable cost is associated with the need for sponsors to customize agreements with foreign entities and to vet them according to the new requirements. As a general matter, smaller sponsors utilize fewer foreign entities because they tend to recruit from fewer foreign countries.

Host families would incur variable costs depending on the days needed per week to document hours of child care, with a maximum cost of \$409.50 per host family annually, or aggregate costs of \$8,804,250 (15 minutes per week to fill out a timesheet for an estimated cost of (15 minutes per week x 52 weeks = 13 hours x \$31.50 = \$409.50, or an aggregate of \$409.50 x 21,500 host families = \$8,804,250).

Sponsor and host family new costs and transfers under this rulemaking are detailed as follows:

Purpose (§ 62.31(a)). There are no new costs associated with this provision.

Program designation (§ 62.31(b)). There are no new costs associated with this provision.

Program conditions (§ 62.31(c)). This new paragraph on program conditions requires sponsors to formalize standard operating procedures and internal controls (to confirm the effectiveness of the procedures) that already should be part of their operations. For example, sponsors already assess whether they have sufficient resources to train headquarters and field staff to ensure regulatory compliance and the health, safety, and welfare of exchange visitors and the children in au pairs' care. They also already deal with the complications that arise when irreconcilable differences require au pairs to be removed from their current host family homes,

such as the following: (1) ensuring the safety of au pairs who are awaiting rematches (and no longer live with a host family); (2) allocating among host families the funding of the educational component and non-cash benefits (i.e., paid time off and sick leave) when rematches occur; (3) specifying the steps for rematching au pairs, including ending programs of otherwise qualified au pairs; (4) identifying criteria determining whether au pairs are qualified for rematch; and (5) placement-related issues. It is estimated that formalizing each standard operating procedure would take a GS-14, Step 5 equivalent staff person eight hours, for a total of 56 hours for all seven procedures. At \$72.97 per hour it would cost each sponsor \$4,086 to formalize these standard operating procedures. The total cost for all sponsors would be \$57,208.

The regulations at § 62.31(c)(3) would establish a new requirement that sponsors annually vet and enter into contracts with foreign third parties that act on their behalf in the operation of their exchange programs. Since the regulations already impute to sponsors non-compliance by third parties acting on their behalf, it is likely that sponsors already vet foreign entities to ensure their suitability. They also are already required to enter into contracts with them. However, the Department of State is seeking public comment on these costs.

In 2021, the size of the fourteen au pair programs ranged from five to nearly 10,500 exchange visitors. The number of foreign entities these sponsors utilized ranged from one to 51. Generally, the number of foreign countries from which sponsors recruit exchange visitors increases as the number of total exchange visitors increases. Three of the fourteen sponsors, however, do not follow that pattern, (i.e., they recruit small numbers from multiple countries), resulting in a higher costs per exchange visitor than those sponsors who cluster their recruitment. The cost, however, is minimal.

The Department of State anticipates that sponsors will update their standard foreign entity contracts to ensure they conform with current regulations. Estimating four hours per contract attorney at \$100 per hour, it will cost each sponsor \$400 to update their current contracts.

The Department of State estimates that it will require sponsor staff at the GS-9 level two hours to vet each foreign entity for a total of \$71.62 per foreign entity. These costs will vary significantly among sponsors, based upon their recruiting patterns. The cost to the sponsor with one foreign entity will be \$71.62. The cost to the sponsor with 51 foreign entities will be \$3,652.62. For the entire sponsor community, it will cost \$27,000.74 to annually vet all 377 foreign entities.

Au pair program eligibility and suitability (§ 62.31(d)). Sponsors already must evaluate the eligibility and suitability of au pair program candidates. The slight changes in the information they must gather is insignificant as sponsors likely routinely update such checklists.

Au pair placement (§ 62.31(e)). There are two primary clarifying regulatory changes to this paragraph. First, sponsors must evaluate the personal space of au pairs in the potential host family homes. The Department of State believes that sponsors already tour a potential host family home for a private bedroom when they interview the families, therefore the clarifying requirement of evaluating personal space will result in no additional cost to any party. Second, the current regulations set forth at 22 CFR 62.31(e)(5) already require sponsors to provide au pairs with information about the prospective host families and their schedules in a written agreement; and sponsors must provide host families with the au pairs' applications. The Department of State believes that a GS-9 level staff member could compile, collect, and distribute electronically the required information in one hour per placement, or \$31.50. For all 21,500 placements, the aggregate cost would be \$677,250. It would cost the smallest sponsor that brings in five au pairs annually \$157.50. It would cost the largest sponsor that brings in 10,500 au pairs \$330,750.

Au pair orientation (§ 62.31(f)). The regulations update the requirements for the existing pre-departure orientation. Sponsors most likely routinely reevaluate their orientation materials, so the cost of these minor changes is insignificant. However, there would be a new requirement for a post-arrival orientation. Sponsors already meet with new au pairs and provide them

introductory information based on the current regulatory requirements at 22 CFR 62.10(c).

Since the proposed regulation identifies certain required topics, however, there will be a cost associated with incorporating the new provisions into standard sponsor materials. The Department of State estimates these new requirements can be completed in eight hours by a staff member at the GS-14 level. \$72.97 per hour x 8 hours = \$583.76 per sponsor or \$8,172.64 for all fourteen sponsors.

Au pair training (§ 62.31(g)). The new regulations do not modify the current au pair training requirements except that au pairs who will be required to drive must take on-line or in-person classes to become familiar with U.S. driving customs and safety. Sponsors also must provide au pairs with jurisdictionally-specific driving regulations. Since this information is readily available online, the Department of State believes this new requirement will not have a substantial cost. The Department estimates online driving courses cost will vary, for example, from \$12 in California⁵ to \$45 in New York.⁶

Host family selection (§ 62.31(h)). Requiring criminal background checks for adult members living in the host family home is a new requirement. It is likely that there are at most two adults living in most homes. County criminal history searches are the most common form of criminal background check. The Department estimates a county court criminal background check will cost \$15-\$20, and a statewide criminal background check will cost \$10-\$20. This type of report typically includes address history, age, misdemeanors, felonies, offense date, case number, arrest history, and offense description.⁷ This is a variable cost that sponsors can pass through to the host families. If sponsors chose not to pass through the cost, the cost to sponsors is calculated as follows: Assuming an average cost of \$20 per background check, the additional

⁵ See https://www.driverseddirect.com/california-online-drivers-ed.aspx?ProductID=33&STATE=CA&DC=wow27off&hc=A&source=GOOGLE_DE-NEWBTW_03242022RSAMAXPIN_HCA_DCwow27off&gclid=EAlaIQobChMlIfLO5bCg_gIVTBbUAR0VGwS5EAAyAIAAEgJYkvD_BwE.

⁶ See <https://www.idrivesafely.com/new-york/5-hour-pre-licensing-online>.

⁷ See <https://www.criminalwatchdog.com/faq/how-much-does-background-check-cost>; https://www.sentrylink.com/web/criminal-check.action?gclid=EAlaIQobChMlt_zk5MWL_gIVK_jBx0IYQmgEAAyASAAEgIsNfD_BwE.

cost would be \$40 per placement. With 21,500 au pairs, the aggregate cost would be \$860,000.

Since this is a variable cost, it will not have a significant impact on smaller sponsors.

Host family orientation (§ 62.31(i)). Sponsors will incur a cost to prepare materials to reflect new orientation requirements and to train field staff on conducting the sessions. The Department of State estimates that preparation of these materials could take 16 hours by a staff member at the GS-9 level combined with eight hours by a staff member at the GS-14 level: $(\$31.50/\text{hr} \times 16 \text{ hr}) + (\$72.97/\text{hr} \times 8 \text{ hr}) = \$1,087.76$ per sponsor. The Department of State estimates that training materials could be developed in eight hours by a staff member at the GS-9 level combined with four hours by a staff member at the GS-14 level, for a total of \$578.36. Together, the development of orientation and training materials could cost \$1,666.12 per sponsor, or \$23,325.68 for all 14 sponsors.

Host Family Agreement (§ 62.31(j)). Sponsors must confirm au pair/host family placements by obtaining the signatures of both host families and au pairs on a Host Family Agreement prior to au pairs' departure from their home countries. This rulemaking requires sponsors to update their current agreements by including both new required general information and placement-specific information. An average hourly fee for a contract attorney is \$50, and the Department of State doubles this rate to account for the location of sponsor organization in higher cost areas. The Department of State estimates contract attorneys could modify existing Host Family Agreements in 16 hours, for a non-recurring cost per sponsor of \$1,600 for drafting initial agreements, or \$22,400 in the aggregate. Once sponsors engage counsel to update their Host Family Agreements to include the new required information, they will need to customize the agreements for each new placement. The Department of State estimates sponsors will spend two hours. It is estimated that customizing the agreements and obtaining required signatures would take a GS-9 Step 5 equivalent staff person two hours, for a total of \$63.00 per placement. The aggregate cost for the 14 sponsors and estimating 21,500 new au pairs each year is estimated to

be \$1,354,500 per year. Of course, each sponsor's portion of this total is driven by their program sizes, with the least impact falling on small sponsors.

Au pair limitations and protections (§ 62.31(k)). It is unknown whether host families will incur additional costs by having to obtain alternative child care when au pairs are using paid time off or sick leave. They may incur additional costs if their child care needs exceed program maximum hours each week. The costs incurred for exigent circumstances that require overtime are discussed below under "Hours". Costs to host families for one-off days are unknown as host families may have family members or alternative caregivers who can provide child care if the au pair is on sick leave. The Department of State seeks comment on these potential costs.

Rematch (§ 62.31(l)). The Department of State has implemented a new refund requirement for sponsors who are unable to rematch au pairs who are eligible to continue on program if their first host family matches are not successful. This new requirement is designed both to provide a greater incentive for sponsors to make good initial matches and to provide an additional protection for au pairs who, through no fault of their own, are unable to continue on the program. Sponsors that are unable to find alternative host families for au pairs that are deemed qualified for rematching (i.e., the rematch was required through no fault of the au pairs) may face significant costs. The new regulation requires sponsors to refund au pairs who are qualified for rematch, but for whom their sponsors are unable to find new suitable host families. Refunds range from 25 percent to 75 percent of all fees au pairs paid to both sponsors and foreign third parties, depending upon the proportion of the duration of the program the au pairs were able to complete. Because qualified au pairs who are awaiting a rematch will continue to need room and board even though they are not being paid for child care, the new regulations also require sponsors to ensure that au pairs have lodging and food during this transition period. The Department is seeking public comment on what specific costs sponsors are likely to incur in the event of a rematch.

Hours (§ 62.31(m)). Sponsors must collect documentation from host families that records the weekly hours and leave of au pairs. The Department of State estimates it will take each sponsor two hours to design the form for collection of this data. Each sponsor will incur the fixed cost of \$63, with the aggregate cost for all sponsors being \$882. The Department of State estimates no additional time to collect such documentation, as the collection can be part of the monthly monitoring process.

Host families would be required to document the weekly hours of the au pair. The Department of State estimates it will take each host family no more than 15 minutes per week to fill out a timesheet for an estimated cost of: 15 minutes x 52 weeks = 13 hours x \$31.50 = \$409.50, or an aggregate of \$409.50 x 21,500 host families = \$8,804,250.

Au pairs would not be permitted to provide more than 40 hours of child care per week, except when requested, approved, and documented through the sponsor. If host families need infrequent exceptions and ask the au pair to work overtime, host families would be required to pay overtime rates to the au pair and notify the sponsor in writing. The overtime rate must include any overtime premium due under applicable Federal, state, or local law for the host family jurisdiction. This cost varies per jurisdiction.

Compensation (§ 62.31(n)). The proposed regulations will require some host families to pay a significantly higher wage than the Federal minimum wage that is currently required. Some host families already do pay higher compensation based on the skill level of the au pair or to cover higher living expenses. Host families under the current regulations pay an estimated \$10,140 (\$195 a week x 52 weeks) to \$15,000 annually in compensation per au pair per year across the United States. This does not include program fees and other in-kind benefits which are additional expenses to host families.

The proposed annual host family compensation increase in transfers are determined based on the four-tiered wage formula. After subtracting the maximum for meal and lodging credits of \$6,790, (assuming that the deduction is permissible each day and week of the year), host families

would pay an annual estimate based on the following tiered levels per au pair: Tier 1- \$9850.00 (40 hours/week x 52 weeks =2,080 hours at \$8/hour = \$16,640 - \$67906,790 meals/lodging = \$9850), Tier 2- \$18,170.00, Tier 3- \$24,410.00, and Tier 4- \$30,650.00. Any overtime expenses for exigent circumstances are discussed below under hours.

Currently only two states, California and Washington, and the cities of Washington, District of Columbia, and Denver, Colorado, would fall under Tier 4. There are currently 2,947 au pairs in California, 1,141 au pairs in Washington, 378 in the District of Columbia, and 260 in Denver, Colorado identified as Tier 4, or a total of 4,726 au pairs out of the annual estimated 21,500 au pairs - or an estimated 22% (4,726/21,500) of au pairs living in Tier 4. Therefore, the total compensation *increase* for Tier 4 is: (\$30,650 (the proposed wage) -\$10,140 (the current wage) = \$20,510 x 4726 (22% of 21,500) = \$96,930,260 million increase for Tier 4 au pairs.

For a sampling of Tier 3, we are using an estimate of 25 percent of au pairs that fall within this tier. The transfer payment would be for 5,375 au pairs out of 21,500 and an *increase* of \$24,410 - \$10,140 (the current wage) = \$14,270 x 5,375 = \$76,701,250.

For a sampling of Tier 2, we are using an estimate of 25 percent of au pairs that fall within this tier. The transfer payment would be for 5,375 au pairs out of 21,500 and an *increase* of \$18,170 - \$10,140 (the current wage) = \$8,030 x 5,375 = \$43,161,250.

There are a number of states in which the Federal minimum wage is still equal to the highest applicable wage and any increase would be minimal as a result of this rulemaking. As an estimate, 28 percent of au pairs identified may fall in Tier 1, or a total of 6,024 au pairs out of 21,500) of au pairs living in Tier 1 would lead to a transfer decrease from host families of \$9,850 - 10,140 (current wage for 45 hours per week) = -\$290 x 28% of 21,500 = -\$1,746,960.

Therefore, the total increase in transfers from host families to au pairs is estimated to be \$215,045,800 (sum of the four tiers' transfers).

Educational component (§ 62.31(o)). The educational stipend of \$500 for an au pair to take college level classes has not been updated since 1993. Sponsors have always been responsible

for tracking whether host families pay the educational stipend and that au pairs complete the required coursework and/or community service. There is no additional cost for sponsors as a result of the rule change. However, sponsors will require host families, to pay a higher educational stipend of \$1,200, an increase of \$700 than currently required. The increased cost to 21,500 host families x \$700 increase would be \$15,050,000.

Monitoring (§ 62.31(p)). Sponsors already must monitor their au pair placements. There is no significant change to the monitoring provisions that would result in any significant cost increase for sponsors.

Duration and extensions (§ 62.31(q)). The new regulation does not impose any new requirements.

Reporting requirements (§ 62.31(r)). There are two changes to the current reporting requirements. First, sponsors must submit annually the following current schedules: a listing of all fees they may charge au pair applicants/participants to participate in the program and listings on a country-specific basis of all fees foreign third parties acting on their behalf may charge au pair applicants/participants to participate in the program. In support of these listings, sponsors must provide website links to both the sponsors' and all their foreign entities' websites on which such fees are posted. Additionally, sponsors must inform the Department of State of any changes in the identity of or information about the foreign entities they engage to assist in their programs. The Department of State presumes that both sponsors and foreign entities already maintain such fee schedules and that there is little churn in the identity of the third parties with which sponsors work. Accordingly, the Department of State estimates that the cost of complying with these new requirements is de minimis.

Repeat participation (§ 62.31(s)). The new regulation does not impose any new requirements. The Department of State asserts that the foreign policy benefits from preserving a nationwide au pair program, providing for the safety of au pairs, and ensuring accountability of

all stakeholders in the au pair program outweigh any additional costs imposed by this rulemaking.

Summary of Benefits, Costs and Transfers

To summarize, the annual increase in transfers from host families to au pairs is estimated to be \$230,095,800 (sum of the four tiers' transfers plus increased educational expenses). One-time costs are estimated to be \$142,940, and recurring annual costs are estimated to be \$15,923,673, of which \$8.9 million are paperwork burden costs incurred by the program's 21,500 host families. The primary benefits of this rulemaking are reduced confusion about the relationship between the Federal au pair regulations and state and local law, which will help to increase participation; a number of safeguards for au pairs and host families that may also increase participation and ultimately benefit sponsors; and, preserving a nationwide program that advances the foreign policy objectives of the Exchange Visitor Program.

The Department of State notes that the increased costs and transfers, especially associated with compensation and educational expenses, could result in a decline in host families in the au pair program. Host families in regions with higher minimum wage rates may seek alternative child care options if the compensation costs outweigh the benefit of a cultural exchange program for their family. This may also result in a reduction of au pairs annually coming to the United States on a J visa. The Department of State requests comment on the extent to which these increased costs and transfers may deter host families from participating in the au pair program.

The Department of State has chosen to analyze the impact of this proposed rule over a five-year time horizon. While this proposed regulation stipulates that the Department of State will update the hourly pay rates in the four-tiered au pair compensation chart in response to changing economic conditions not less than every three years, the Department is unable to forecast economic conditions at this time, and therefore assumes that the compensation tiers will remain the same for at least the next five years. The Department of State is requesting comment on this

assumption. The below table outlines the total discounted (at 3% and 7%) and annualized costs and transfers over the analytic period:

	Year 1	Year 2	Year 3	Year 4	Year 5
Annual Costs	\$16,066,613	\$15,923,673	\$15,923,673	\$15,923,673	\$15,923,673
Annual Transfers	\$230,095,800	\$230,095,800	\$230,095,800	\$230,095,800	\$230,095,800
Total Costs (3%)	\$73,064,536	Annualized (3%)	\$15,953,975		
Total Transfers (3%)	\$1,053,771,389	Annualized (3%)	\$230,095,800		
Total Costs (7%)	\$65,423,792	Annualized (7%)	\$15,956,254		
Total Transfers (7%)	\$943,438,209	Annualized (7%)	\$230,095,800		

Executive Order 12988

The Department of State has reviewed this rulemaking in light of sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burdens.

Executive Orders 12372 and 13132 – Federalism

A rule has federalism implications under Executive Order 13132 if, *inter alia*, it has “substantial direct effects on the distribution of power and responsibilities among municipalities, states, and the federal government.” 64 FR 43244. While this proposed rule memorializes the Department of State’s view of the distribution of power and responsibilities in this area, the Department of State recognizes that section 4 of Executive Order 13132 specifically provides for notice and an opportunity to participate for affected State and local officials. Accordingly, even though the Department of State does not believe that it is required to consult with states or local governments under Executive Order 13132 because the proposed rule does not alter the basic State-Federal scheme established under the statutes that created the Exchange Visitor Program, the Department of State welcomes comments on this proposed rulemaking from state and local governments, in order to improve the administration of the au pair program and to maximize

stakeholder input. Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities does not apply to this regulation.

Paperwork Reduction Act

The Department of State submitted to the Office of Management and Budget (OMB), for review and approval, the reporting and recordkeeping requirements inherent in this rulemaking. This proposed rule requires new collection of information by sponsors.

The information collection requirements contained in this proposed rule are described pursuant to the Paperwork Reduction Act and OMB Control Number 1405-0147, Form DS-7000, which requires collection of additional information for the Exchange Visitor Program. As part of this rulemaking, the Department of State is seeking comment on the administrative burden associated with modifying the collection of information.

This is an expansion of an information collection utilized by the Bureau of Educational and Cultural Affairs in its administration and program oversight of the Exchange Visitor Program (J-Visa) under the provisions of the Mutual Educational and Cultural Exchange Act, as amended.

(1) Type of Information Collection: Revision

(2) Title of the Form/Collection: Recording, Reporting, and Data Collection Requirements under 22 CFR part 62.

(3) Agency form number: DS-7000.

(4) Affected public: This information collection will require recordkeeping, disclosures to host families, and reporting by designated sponsors.

(5) Change to information collected by the Department of State: The Department of State is proposing changes to recordkeeping and reporting requirements for sponsors:

- Sponsors will update each host family agreement to include required disclosures between the exchange visitor and host family (proposed 62.31(j)).

- Sponsors will require host families to document actual hours worked by the au pair and provide those records to the sponsor (proposed 62.31(m)). Host families would be required to document the weekly hours of the au pair in a timesheet.
- Sponsors will report new information to the Department of State annually, including: a listing of all fees they may charge au pair applicants/participants to participate in the program and listings on a country-specific basis of all fees foreign third parties acting on their behalf may charge au pair applicants/participants to participate in the program. In support of these listings, sponsors must provide website links to both the sponsors' and all their foreign entities' websites on which such fees are posted (proposed 62.31(r)).
- Sponsors will maintain records of business license, bankruptcy, previous experience, and notarized recent financial statements for overseas third parties (proposed 62.31(c)(3)(ii)).
- Sponsors must conduct and document a host family orientation session for all adult family members. Sponsors must provide to the host family copies of the signed and dated Host Family Agreement, the Department of State's Exchange Visitor Program regulations, brochures, and advisory letters regarding the au pair program, and a print-out of the current page from the Internal Revenue Service's website on the topic of "Taxation of Nonresident Aliens" (proposed 62.31(i)).

(6) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: The total number of respondents for the au pair are the fourteen organizations designated by the Department of State at the time of this rulemaking to conduct the au pair exchange program activities. The estimated hour burden per response for preparing the host family agreement (62.31(j)) is 2 hours. The estimated hour burden per response for documenting the au pair child care hours (62.31(m)) is 2 hours. The Department of State estimates it will take each host family no more than 15 minutes per week or 13 hours per respondent to fill out a timesheet. The estimated hour burden per response for annual reporting to the Department of State (62.31(r)) is de minimus. The estimated hour burden per sponsor for

maintaining records on the foreign third party (62.31(c)(3)) is 54 hours. The estimated hour burden per sponsor per response for the host family orientation disclosures (62.31(i)) is 24 hours. In sum, the annual burden is estimated to be an additional 82 hours per respondent (sponsor). The Department of State invites public comment on these estimates.

(7) An estimate of the total annual public burden (in hours) associated with the collection: The total estimated annual hour burden associated with this collection is 280,648 hours (82 hours per sponsor x 14 sponsors + 13 hours per host family x 21,500 host families).

(8) An estimate of the total public burden (in cost) associated with the collection:

The estimated total annual cost burden associated with this collection of information is \$8,845,057.

The Department of State seeks public comment on:

- Whether the collection of information is necessary for the proper performance of the functions of the Department of State, including whether the information will have practical utility;
- The accuracy of the Department of State's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information to be collected; and
- How to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, (e.g., permitting electronic submission of responses).

List of Subjects for Part 62

Cultural exchange programs, Reporting and recordkeeping requirements.

Accordingly, the Department of State proposes to amend 22 CFR part 62 as follows:

PART 62 -- EXCHANGE VISITOR PROGRAM

1. The authority citation for part 62 is revised to read as follows:

Authority: 8 U.S.C. 1101(a)(15)(J), 1182, 1184, 1258; 22 U.S.C. 1431 et seq.; 22 U.S.C. 2451 et seq.; 22 U.S.C. 2651(a); Pub. L. 105-277, Div. G, 112 Stat. 2681 et seq.; Reorganization Plan No. 2 of 1977, 3 CFR, 1977 Comp. p. 200; E.O. 12048 of March 27, 1978; 3 CFR, 1978 Comp. p. 168; Pub. L. 104-208, Div. C, 110 Stat. 3009-546, as amended; Pub. L. 107-56, 416, 115 Stat. 354; and Pub. L. 107-173, 116 Stat. 543.

2. Revise § 62.31 to read as follows:

§ 62.31 Au pairs.

(a) *Purpose.* The purpose of the Au pair category is to provide foreign nationals the opportunity to live with and participate directly in the home life of an American host family, provide child care, complete an educational component, and participate in cultural activities. Au pairs may enroll in either a part-time program (24-31 hours per week) or a full-time program (32-40 hours per week).

(b) *Program designation.* The Department of State may, in its sole discretion, designate bona fide programs satisfying the objectives set forth in paragraph (a) of this section and having the organizational capacity to successfully administer an au pair exchange program.

(c) *Program conditions.* Sponsors designated by the Department of State to conduct au pair exchange programs must:

(1) Establish standard operating procedures for headquarters and field staff (e.g., local and regional coordinators), contractors, and third parties designed, at a minimum, to achieve the following goals and internal controls:

(i) Provision of sufficient resources for and training of headquarters and field staff to ensure both regulatory compliance and the health, safety, privacy, and welfare of au pairs and the children in their care;

(ii) Amendment to or termination of the Host Family Agreement in the event an au pair or host family requests a rematch;

(iii) Development of contingency plans covering au pairs at any time they are not living with a host family, (e.g., during the rematch process and following removal from one home and prior to a new placement and/or prior to departing the United States), that at a minimum, describe the following conditions:

(A) Where au pairs live and who is responsible for providing living arrangements and food;

(B) Who is responsible for transportation costs for moving an au pair to a different geographic location, if necessary; and

(C) That the au pair is not responsible for costs associated with paragraphs (c)(1)(iii)(A) and (B) of this section.

(iv) Development of contingency plans covering funding of the educational component when a host family has or has not paid any or all of an educational stipend of a departing au pair, when an arriving or departing au pair has or has not received any or all of the educational stipend, and when the arriving or departing au pair has or has not completed any or all of the educational requirement.

(v) Establish the allocation of the non-income-related cost of paid time off and/or paid sick leave for au pairs when a host family has/has not given a departing au pair some or all of paid leave, and an arriving/departing au pair has/has not taken any or all of paid leave.

(vi) A process for rematching qualified au pairs to new placements, including for ending programs of au pairs for whom a new placement cannot be arranged;

(vii) Establish guidelines and identify circumstances and behaviors that indicate that an au pair is not qualified to remain on program and when the au pair's program must be terminated;

(viii) Establish a process for responding to issues, concerns, or emergencies revealed during routine monitoring or on an ad hoc basis.

(2) Require that all local coordinators authorized to act on the sponsor's behalf in both routine and emergency matters:

(i) Live within one hour's driving time from all placements for which they are responsible;

(ii) Do not have a family or work connection with the host families for whom they are responsible;

(iii) Be responsible for no more than 15 placements if they work with the program for fewer than 32 hours per week (i.e., part-time); and

(iv) Be responsible for no more than 30 placements if they work with the program for 32-40 hours per week (i.e., full-time).

(3) A sponsor that engages third parties, as defined in § 62.2, that operate outside the United States (i.e., foreign third party) to act on their behalf in the administration of its au pair program will be held accountable by the Department of State for the actions of those foreign third parties and must:

(i) Annually execute a written agreement that outlines the obligations and full relationship between the sponsors and such third parties on all matters involving fulfilling the core programmatic functions of screening and orientation that may be conducted outside the United States; including descriptions of all the services and associated costs that it may charge applicants/au pairs, including any recruitment fees charged prior to official acceptance into the program, before and during their programs;

(ii) Annually review and maintain the following documentation for potential or existing foreign entities on the Foreign Entity Report set forth in paragraph (r) of this section:

(A) Proof of business licensing and/or registration to enable them to conduct business in the jurisdiction(s) where they operate;

(B) Disclosure of any previous bankruptcy and of any pending legal actions or complaints against such an entity on file with local authorities;

(C) Summary of previous experience conducting J-1 Exchange Visitor Program activities;

(D) A copy of the sponsor-approved advertising materials the foreign entities intend to use to market the sponsors' programs (including original and English translations); and

(E) A copy of the foreign entity's notarized recent financial statements.

(4) Draft and implement standard operating procedures and internal controls to ensure that foreign entities comply with the terms of such agreements.

(5) Solicit from host families and au pairs information for reporting requirements under this section (including but not limited to those identified in paragraph (r) of this section).

(d) *Au pair eligibility.* (1) In addition to satisfying the requirements of § 62.10(a)(1), sponsors must demonstrate that au pairs:

(i) Are between the ages of 18 and 26 as of the program begin date listed on Form DS-2019 (i.e., au pairs may turn 27 during an initial program and still qualify for an extension);

(ii) Are secondary school graduates, or equivalent;

(iii) Are proficient in spoken English and able to seek aid or assistance in medical or other emergencies as evidenced by a report of a personal interview conducted in English by the sponsor;

(iv) Are capable of fully participating in the program as documented by a report (with English translation) from a licensed physician that the applicant satisfactorily completed a physical exam (completed no more than 45 days prior to execution of the contract by the au pair and the host family) including, among other things proof of the following conditions:

(A) Are fully vaccinated pursuant to the current recommendations of the Advisory Committee for Immunization Practices (see, e.g., <https://www.cdc.gov/vaccines/schedules/downloads/adult/adult-combined-schedule.pdf>); and

(B) Are free from active or latent tuberculosis demonstrated pursuant to a tuberculosis test currently approved by the Food and Drug Administration or a chest x-ray.

(v) Are interviewed both by the sponsor and the host family;

(vi) Demonstrate good character, as evidenced by three, non-family related personal or employment references (with English translations) and a criminal background check report or its recognized equivalent (with English translation); and

(vii) Demonstrate suitability to be an au pair, as evidenced by a personality profile (with English translation) that is based upon a psychometric test designed to measure differences in characteristics among applicants against those characteristics considered most important to successfully participate in the au pair program.

(2) For au pairs who will be placed with host families where driving is a requirement as written in the Host Family Agreement:

(i) Possess an active driver's license from their home country issued at least one year before the program begin date; and

(ii) Be able to obtain an international or jurisdictional driver's license if required by the jurisdiction in which the au pair is placed.

(3) Are not accompanied by a spouse or dependent while on program.

(e) *Au pair placement.* Sponsors must demonstrate they have secured a host family placement prior to the au pair's departure from the home country or before being placed with a new host family (i.e., rematch) by obtaining the signatures of the host family and au pair on a dated Host Family Agreement.

(1) Sponsors shall not:

(i) Place an au pair with a host family unless a head of household(s) or other responsible adult will remain in the home for the first three days following the au pair's arrival;

(ii) Place an au pair with a host family having a child aged less than three months unless the au pair and host family have specifically agreed in writing that that a parent or other responsible adult will be primarily responsible for the infant at all times;

(iii) Place an au pair with a host family having any children under the age of two unless the au pair has at least 200 hours of documented infant child care experience no later than the program begin date.

(iv) Place an au pair with a host family having a special needs child, as so identified by the host family, unless the au pair has specifically identified his or her prior experience, skills, or

training in the care of special needs children and the host family has reviewed and acknowledged in writing the au pair's prior experience, skills, or training so identified;

(v) Place an au pair with more than one host family to provide child care outside of the primary host family; and

(vi) Place an au pair with a host family that is not capable of providing a comfortable and nurturing home environment free from sexual harassment, exploitation, or any other type of abuse. Sponsors must ensure that the home is safe, comfortable and clean; and that the au pair has a private and lockable bedroom with a bed that is neither convertible nor inflatable in nature, and has adequate storage space for clothes and personal belongings; a private and lockable bathroom; and reasonable, unimpeded access to the outside of the house during non-child care hours, while the au pair is on leave, and in the event of a fire or similar emergency.

(2) Before finalizing an au pair placement, sponsors must:

(i) Provide the host family with the prospective au pair's complete application, including all references and a copy of the sponsor's interview report;

(ii) Provide the au pair with a description of the placement, including at a minimum:

(A) Short biographical description of host family members, including age and educational level;

(B) Information about host family work hours and children's school attendance;

(C) A description of the area in which the host family lives; and

(D) Any additional information necessary to reasonably inform the au pair about the family dynamic.

(f) *Au pair orientation*—(1) *Pre-departure materials*. In addition to the requirements in § 62.10(b), sponsors must provide au pairs the following information before they depart from their home countries:

(i) A copy of the Host Family Agreement with dates and all signatures;

(ii) A detailed summary of travel arrangements for the au pair to travel to and from the au pair's home country and the host family's home in the United States;

(iii) An explanation of requirements for au pair to purchase a round-trip ticket or obtain and bring on program a pre-paid return-flight airline voucher of a value equal to the cost of out-bound flight;

(iv) A copy of Department of State regulations governing the au pair's participation in the Exchange Visitor Program, welcome brochure, exchange visitors' rights and protections trifold, and advisory letter regarding the au pair program; information on the educational and cultural exchange goals of the program (including educational requirement and allowance); and

(v) Information on compensation and benefits (including in-kind benefits such as cell phone, gym membership, or access to personal car), allowable deductions, maximum work hours, time off; child care duties (including documenting child care hours); and requirements for paying state and Federal taxes.

(2) *Post-arrival orientation.* In addition to the requirements in § 62.10(c), sponsors must provide and document the au pairs' participation in a post-arrival orientation that covers, at a minimum, the following topics:

(i) The purpose and intent of the au pair program as an educational and cultural exchange program that assists the Department of State in achieving U.S. foreign policy objectives and the au pair's role in an educational and cultural exchange program;

(ii) Sponsor and host family expectations of au pair behavior, including unacceptable actions; sponsor rules; rematch criteria, the specific family's guidance on the use of information about or photographs of the family members or family home; and the relevant portions of the Exchange Visitor Program regulations (e.g., monitoring, sponsor support, permitted duties);

(iii) Sponsor resources available to assist au pairs in fulfilling the educational requirement and cultural goals of their program;

(iv) Information regarding paying State and Federal income taxes, withholding obligations, and how to seek tax preparation and filing assistance in the placement community; and

(v) Sponsor headquarter and local coordinator contact information, including the sponsor's 24/7 emergency contact information.

(g) *Au pair training.* Prior to placing an au pair in a host family home, sponsors shall provide the au pair with, and compensate the au pair for, the following required training:

(1) A minimum of eight hours of child safety instruction of which no less than four hours will focus on infants;

(2) A minimum of 24 hours of child development instruction of which no less than four hours will focus on children under the age of two; and

(3) For au pairs whose duties enumerated in the Host Family Agreement require driving, an online or in-person driving instruction course designed to introduce international drivers to U.S. driving customs; and information covering state and local driving laws (including safety information on, e.g., child car seats, seat belts, and dangers and penalties for driving while intoxicated).

(h) *Host family eligibility.* Each sponsor must ensure that host families treat this program as an educational and cultural exchange and meet the following eligibility requirements prior to signing a Host Family Agreement with an au pair:

(1) Head of household(s) are U.S. citizens or lawful permanent residents;

(2) Head of household(s) are fluent in spoken English and are prepared to speak English with the au pair on a daily basis;

(3) No member of the immediate or extended host family is a relative of the au pair;

(4) All adult members living in the host family home have been personally interviewed by a sponsor representative;

(5) Every permanent member of the host family household 18 years of age or older, and any member of the host family household who will turn 18 during the au pair's program, and any adult who joins the household for more than 30 days demonstrates good character by:

(i) Undergoing a criminal background check (which must include a search of the Department of Justice's National Sex Offender Public Registry) at the time of the host family's application or promptly after joining the household, as appropriate; and

(ii) Providing at least one employment, if employed, and one personal character reference.

(6) The host family has adequate financial resources to undertake all the host family responsibilities specified in the regulations;

(7) The host family commits not to reside outside of the United States and its territories, for longer than a cumulative total of 30 days or at a domestic location within the United States that is more than one hour's drive from a local coordinator during the au pair's program;

(8) The host family commits to promptly report to the sponsor any material changes in the family composition, changes in circumstances that could create stress or anxiety within the family (e.g., death, divorce, loss of job); and any host parent arrests or moving traffic violations.

(i) *Host family orientation.* (1) After a Host Family Agreement has been fully executed and prior to an au pair's arrival at a host family home, sponsors must conduct and document a host family orientation session for all adult family members. At a minimum, the sponsor must provide copies of the following documents:

(i) A copy of the signed and dated Host Family Agreement;

(ii) A copy of Department of State's Exchange Visitor Program regulations, brochures, and advisory letters regarding the au pair program;

(iii) A print-out of the current page from the Internal Revenue Service's website on the topic of "Taxation of Nonresident Aliens."

(2) The sponsor should include, at a minimum, discussions on the following topics, giving the host family the opportunity to ask questions to ensure they understand their obligations and the regulations governing the placement:

(i) The purpose and intent of the au pair program as an educational and cultural exchange program that assists the Department of State in achieving U.S. foreign policy objectives; the role of host families in achieving that purpose; and ongoing monitoring and reporting requirements;

(ii) All topics listed in the Host Family Agreement, including the mandatory family day conference organized by the sponsor.

(iii) The process and schedule for documenting and submitting the au pair's child care hours, maximum hours of child care, and the requirement to report within five calendar days child care hours in excess of program limits with an accompanying explanation of the exigent circumstances;

(iv) How to handle and seek sponsor assistance in case of problems and disputes with au pairs and how to report emergencies and problems to the sponsor and/or the Department of State;

(v) Their requirement to promptly report to the sponsor any material changes in the family composition, changes in circumstances that could create stress or anxiety within the family (e.g., death, divorce, loss of job); and any host parent arrests or moving traffic violations.

(vi) How cultural differences and practices may affect the host family or the au pair and strategies for facilitating cultural activities for their au pairs; and

(vii) The requirement to provide a safe, comfortable, and clean home environment free from sexual harassment, exploitation, or any other form of abuse; the au pair's right to privacy when not providing child care duties (e.g., private bedroom and private bathroom, possession of personal belongings and travel or other documentation (i.e., passport, visa, Form DS-2019)).

(j) *Host Family Agreement*. Prior to issuance of Form DS-2019, sponsors must prepare a standard agreement between the au pair and host family that is printed on sponsor letterhead or otherwise indicates the placement is "under the sponsorship of [name of sponsor]." The

agreement must include, at a minimum, the following sections, and the au pair and host family must individually initial each section to demonstrate their review of and acceptance of the following provisions:

(1) *Fees*. An itemized list of the total fees and estimated costs of the program charged by the sponsor and the sponsor's third parties that the au pair and host family each will incur;

(2) *Duties*. The agreement must include lists of the types of child care duties that are appropriate for an au pair and the types of duties that are not:

(i) Appropriate au pair duties involve assisting with the daily needs and schedules of host family children by performing activities like the ones listed below:

(A) Running children-related errands;

(B) Driving or escorting children to school, appointments, outings, and activities;

(C) Preparing children's meals and snacks and cleaning up afterwards;

(D) Tidying the children's bedrooms and bathrooms including making beds, changing sheets, doing children's laundry, and picking up toys;

(E) Monitoring children's homework and chores (including monitoring the feeding or walking of pets);

(F) Bathing and dressing children; and

(G) Additional duties associated with a child with special needs, which should be listed.

(ii) Inappropriate au pair duties involve the activities listed below, and assignment of these or similar activities may result in sponsor termination of the host family from the program:

(A) Providing professional, medical or nursing services;

(B) Running family-related errands, such as grocery shopping;

(C) Cleaning the house or working in the yard;

(D) Doing host parent laundry;

(E) Preparing meals for the family or cleaning the kitchen;

(F) Managing the household, including correspondence;

(G) Mandatory responsibility for pets;

(H) Caring for other people's children during off-site play date; and

(I) Other duties that are not related to the host children.

(3) *Weekly schedule.* The sponsor should ensure that the host family prepares a typical weekly schedule (including duties and hours) for the sponsor to review (to confirm its compliance with regulatory requirements) before including it in the agreement. To modify the schedule, the sponsor should ensure that the host family prepares a new typical weekly schedule (with input from the au pair, as appropriate) and submits it to the sponsor for review before seeking approval from the au pair.

(4) *Weekends.* A statement that the host family and the au pair agree that the host family will identify, before the end of each month, the weekends during the next month that the au pair need not provide child care.

(5) *Paid time off.* A statement containing the following points:

(i) The au pair agrees to provide four weeks' notice prior to taking paid time off.

(ii) The host family may not dictate when the au pair takes paid time off.

(iii) If the host family takes the au pair on a family vacation, they must pay all the au pair's room, board, and transportation costs and, although the schedule may vary, the au pair may only work the permissible number of hours.

(6) *Compensation.* A summary of the gross compensation (i.e., not net of taxes) that the host family will pay the au pair weekly. Sponsors shall require host families to identify the highest of the Federal, State, or local minimum wage on the host family application, and also require host families to notify the sponsor if there is a change to the Federal, State, or local minimum wage during the au pair's program, and if necessary, initiate an updated Host Family Agreement under the compensation paragraph.

(7) *Hours of child care.* A statement that the au pair's obligation is limited to no more than ten hours per day and no more than 31 or 40 hours per week, depending upon whether the au pair

is on a part-time or full-time program, and that overtime is not permitted except in exigent circumstances.

(8) *Excess hours.* A statement that host families must report within five calendar days child care hours in excess of program limits with an accompanying explanation of the exigent circumstances.

(9) *Education component.* A statement containing the following points:

(i) Both parties have read the four options available for the au pair to complete the educational component of the program;

(ii) The au pair will pursue one of the options;

(iii) The host family will facilitate the au pair's efforts to pursue one of the options, including finding alternate child care if necessary and assisting with transportation; and

(iv) The host family will pay to the au pair or school the required educational stipend.

(10) *Room and board.* Identify the number of days per week, including weekends, that the host family will provide lodging and meals.

(11) *In-kind benefits.* A list of in-kind benefits (e.g., cell phone, gym membership, car for personal use) the host family will provide the au pair, including charges for such benefits, if applicable and if the au pair wishes to avail themselves of such benefits.

(12) *Training.* A summary of any training the sponsor will provide the au pair, including specialized training for babies, infants, and children with special needs.

(13) *Home Environment.* A statement of the host family's commitment to provide the au pair with a safe, comfortable, and clean home environment – free from sexual harassment, exploitation, or any other form of abuse - including a suitable private bedroom with a bed for the au pair that is neither convertible nor inflatable in nature, adequate storage space for clothing and personal belongings, study space, access to bathroom facilities that are lockable and not connected to any private bedroom other than the au pair's, or that are lockable and connected to the au pair's own bedroom and not shared with a family member or any other resident in the

home, and with reasonable unimpeded access to outdoors for the au pair's non-child care hours and leave and in case of emergencies.

(14) *Changes to the Host Family Agreement.* Sponsors must approve any changes to the Host Family Agreement and maintain written documentation with both parties' signatures to effect such changes.

(15) *Terms of Host Family Agreement.* Sponsors have the option to end their relationships with host families and end the programs of au pairs who do not follow the terms the parties agreed to in the Host Family Agreement or authorized modifications thereto.

(16) *Request rematch.* The Host Family Agreement does not limit an au pair or host family from requesting a rematch pursuant to paragraph (l) of this section or from ending their participation in the au pair program in accordance with sponsor procedures.

(k) *Au pair limitations and protections.* (1) Sponsors shall require that:

(i) With the exception of at-home play dates, host families may not place au pairs in charge of children that are not part of the host family; and a sufficient number of adults must be present at any group activity to supervise the children for whom the au pair is not responsible.

(ii) At a minimum, host families must give au pairs an uninterrupted eight-hour period of rest per every 24 hours to ensure adequate sleep and time away from duty.

(iii) At a minimum, host families must give au pairs one and one-half consecutive days off (36 hours) each calendar week and one complete weekend (48 hours) off each calendar month.

(iv) At a minimum, host families must give au pairs 56 hours of paid sick leave for a 12-month program and a pro-rated number of sick leave hours for program extensions shorter than 12 months. If the need for sick leave is foreseeable, the request should be made seven days in advance. If the need for sick leave is not foreseeable, the au pair should request leave as soon as practicable after becoming aware of the need for leave.

(v) At a minimum, host families must give au pair 80 hours (e.g., the equivalent of ten working days) of paid time off prior to the completion of a 12-month program, at the au pair's

request. The host family must permit the au pair to take 40 hours of such leave in conjunction with a 36- or 48-hour weekend. Host families may not dictate when au pairs may take paid time off. If they take the au pair on a family vacation, they may not subtract any time off from the au pair's 80 hours leave time.

(vi) No host family may deprive an au pair from access to, or withhold or hold without the au pair's permission, an au pair's identification papers (including passport and Social Security card), cellphone, flight tickets or other travel documents, Form DS-2019, or other personal property. Sponsors shall require that host families may not prevent communication between an au pair and the sponsor or the Department of State at any time, and between the au pair and his or her family while the au pair is not providing child care.

(vii) Host families must provide au pairs a safe, comfortable, and clean home environment free from sexual harassment, exploitation, or any other form of abuse, and they must respect the au pair's privacy, including both their personal living space and their personal belongings, including travel or other documentation (e.g., passport, visa, Form DS-2019); and

(viii) Host family members may not photograph or create video recordings (e.g., use a nanny-cam) of an au pair without prior and ongoing consent by the au pair. Host family members may not photograph or create video recordings of the au pair's private bedroom or primary bathroom while the au pair occupies them.

(2) Sponsors may terminate host families from the program if they fail to comply with the requirements in paragraph (k)(1) of this section.

(1) *Rematch.* Irreconcilable differences between a host family and au pair require that the au pair be removed from the host family home. The sponsor must report these instances to the Department of State within the next business day and pursuant to reporting requirements at paragraph (r)(2) of this section.

(1) If the sponsor determines that actions on the part of the au pair demonstrate their unsuitability to be placed with a new host family, the sponsor must end the au pair's program in

the Student and Exchange Visitor Information System (SEVIS) and ensure that return travel expenses have been secured.

(2) If the sponsor determines that the au pair still meets the au pair eligibility criteria, the sponsor must make an expedient, fair, and good faith effort to find a new host family placement for the au pair.

(3) If the au pair does not wish to be rematched, the sponsor must end the au pair's program in SEVIS, and the au pair will receive no refund from the sponsor, unless the au pair was subject to harassment, exploitation, or any other form of abuse in the au pair placement.

(4) Au pairs that have completed 75 percent of their initial program or are on six-, nine-, or 12-month extensions may not request a rematch and are not entitled to any refund of fees paid.

(5) If the sponsor is unable to find a suitable rematch for the au pair, the sponsor must refund the following percentages of all fees they charged the au pair to participate in the program, as well as a percentage of the return trip ticket, based on the portion of the program duration the au pair completed before leaving the host family's home:

- (i) Less than 25% of the initial program duration: 75%.
- (ii) Between 25-49% of the initial program duration: 50%.
- (iii) Between 50-75% of the initial program duration: 25%.
- (iv) Over 75% of the program duration: 0%.

(6) Before a rematched au pair moves into a new host family home, sponsors must confirm that new host family meets the eligibility requirements set forth in paragraph (h) of this section, obtain a fully executed Host Family Agreement between the rematched au pair and the new host family; and conduct a host family orientation as set forth in paragraph (i) of this section.

(7) For an au pair that has enrolled in an in-person class, the sponsor should use best efforts to place the au pair in a geographic locale that is convenient for continuation of the class.

(m) *Hours.* (1) The weekly hours an au pair may provide child care must be stipulated in the Host Family Agreement and may:

(i) Either be identified as a part time program providing 24-31 hours of child care per week, or identified as a full-time program providing 32-40 hours of child care per week;

(ii) Not carry over hours not worked in one week (i.e., the difference between an au pair's actual hours worked in a week and their program's maximum-hours limit) over to the next week to exceed the program's maximum-hours limit in that next week; and

(iii) Not provide more than ten hours of child care each day.

(2) Hours providing child care is defined as follows:

(i) Any time the au pair is a caretaker for the family children (including time to drop off or pick up children);

(ii) Any time the au pair is "on call," (i.e., periods of time they are not free to do as they please, because the host family has an imminent need for child care); and

(iii) Time spent at the required family day conference.

(3) Time spent by an au pair with host families during which the au pair is entirely relieved of child care duties and voluntarily participating as a member of the family, not as a caretaker, is not considered time providing child care.

(4) When an au pair is required to work overnight hours:

(i) The au pairs' regular work schedules may not include providing child care between 11 p.m. and 5 a.m., unless exigent circumstances arise, in which case the au pair may work these hours for no more than three consecutive nights;

(ii) If the au pair is considered a caretaker during these overnight hours, the au pair may nevertheless sleep and count these hours toward providing child care: and

(iii) To the extent overnight hours result in hours exceeding the maximum amount permitted under the program, the au pair must be compensated as specified in paragraph (n)(4)(iv) of this section.

(5) If the host family and au pair agree to change the number or schedule of child-care hours due to extenuating circumstances (e.g., a reduction or change in hours to facilitate the au pair's

pursuit of the educational component), sponsors must ensure that they modify and re-execute the Host Family Agreement.

(6) Sponsors shall develop and implement written standard operational procedures to track and document the weekly compensation in conformance with paragraphs (n)(1) and (2) of this section, and to ensure that:

(i) Host families create a written weekly document signed by the host family and the au pair (in wet ink or using electronic signature) detailing the number of hours and days of provided child care that week, the number of hours used as the required time off, the total amount of compensation paid to the au pair for that week, any room and board deductions taken, any paid time off or sick leave used, if applicable; and

(ii) Host families provide copies of the signed document to the au pair each week, and sponsors must collect and review the documents each month.

(7) Sponsors may terminate the program participation of a host family or au pair if they do not adhere to the maximum hours and requirements set forth in this section or if there are repeated requests for child care hours in excess of program limits.

(n) *Compensation.* Sponsors must ensure that:

(1) Host families compensate au pairs on a weekly basis based on the maximum number of child care hours of the au pair program and for any hours worked in excess of that maximum number and keep a document as set forth in paragraph (m)(6) of this section. Weekly payments shall be deposited directly into a bank account held in the au pair's name.

(2) Host families are permitted to deduct room and board expenses as set forth under the Fair Labor Standards Act and agreed upon in the Host Family Agreement. Credits for room and board may be taken only when the employee actually receives the lodging and meals. The following amounts are permissible credits under the FLSA towards an au pair's wages for meals actually provided: \$2.72 for a breakfast, \$3.63 for a lunch, and \$4.53 for a dinner (or \$10.88 per day if all meals are provided). The following amount is a permissible credit under the FLSA

towards an au pair's wages for lodging actually provided: \$54.38 per week. The total permissible credit towards an au pair's wages per week for a full seven days of room and board actually provided is \$130.54 (7 times \$10.88 equals \$76.16 for a full week of meals plus \$54.38 for a full week of lodging). The permissible credit does not change based on the tier wage level at which the au pair is compensated.

(3) Host families are permitted to deduct from au pair's pay any cost of in-kind benefits that are agreed upon in the Host Family Agreement. The host family may charge the au pair for such benefits if the au pair agrees to the charge and the host family does not profit from the amount charged. The host family may not, however, deduct from the au pair's wages items that are primarily for the benefit or convenience of the host family or sponsor, nor may the host family require the au pair to reimburse the host family in cash for the cost of such items in lieu of deducting the cost from the au pair's wages. The host family may charge the au pair for such benefits only if the in-kind benefit is truly for the benefit of the au pair, the au pair agrees to the charge, and the host family does not profit from the amount charged. Sponsors must ensure that the host family does not charge the au pair if the host family requires the au pair to accept any of the benefits (such as a cell phone so that the family may reach the au pair); and

(4) The hourly rate of compensation is based on a multi-tiered system.

(i) The sponsor must first identify the highest of the Federal, State, or local minimum wage rate that applies to the jurisdiction in which the host family's primary residence is located;

(ii) The sponsor then determines the hourly rate the host family must pay the au pair based on the tier in which the rate identified falls in the following table:

	Based upon the Host Family City, the highest of Federal, State, or local min wage:	Au pair receives:
Tier 1	\$7.25 - \$8.00 per hour	\$8 per hour
Tier 2	\$8.01 - \$12.00 per hour	\$12 per hour
Tier 3	\$12.01 - \$15.00 per hour	\$15 per hour
Tier 4	\$15.01 - \$18.00 per hour	\$18 per hour*

** Or the applicable Federal, State, or local minimum hourly wage, if higher.*

(iii) The au pair receives the maximum amount of the identified tier, or the highest of the applicable Federal, State, or local minimum wage if higher.

(iv) When part-time au pairs work more than 31 hours in a week regardless of the reason but not more than 40 hours, they shall be compensated for those excess hours at the hourly rate of the applicable tier identified in paragraph (n)(4)(ii) of this section or the highest of the applicable Federal, State, or local minimum wage if higher. When part-time or full-time au pairs work over 40 hours in a week regardless of the reason, they shall be compensated for those excess hours at the hourly rate of the applicable tier identified in paragraph (n)(4)(ii) of this section or the highest of the applicable Federal, State, or local minimum wage if higher, and they must also be paid any overtime premium due under applicable Federal, State, or local law. In addition, au pairs must be paid any other overtime premiums due under applicable Federal, State, or local law for other hours worked.

(v) The Department of State will periodically, but no less than every three years (or at any shorter interval that is desirable and feasible), update the hourly pay rates in the chart in paragraph (n)(4)(ii) of this section via Notice, in the *Federal Register*, in response to changes in economic conditions. The required change will be accomplished by adjusting the upper range of each tier by an identical amount each update cycle. Although the Department of State will strive to increase the hourly pay rates in the chart to keep up with the highest applicable minimum wage, if an au pair resides in a jurisdiction that has a minimum wage that is higher than the upper range of Tier 4, the au pair shall be paid at that higher minimum wage rate regardless of the rate in Tier 4.

(o) *Educational component.* A sponsor must ensure that au pairs complete one of the following four educational component options during an initial, extended, or rematched program:

(1) *Academic coursework option:* Enroll in or register at a U.S. post-secondary accredited academic institution and demonstrate that the au pair either completed with a passing mark or successfully audited the required course(s).

(i) For the initial twelve-month program and for a nine- or twelve-month extension, an au pair must pass or formally audit academic coursework equivalent to three semester classes (nine semester hours or their equivalent).

(A) An au pair may pursue no more than one third of the required coursework online if local circumstances permit.

(B) This coursework must be spread over two semesters or equivalent.

(ii) For a six-month extension, an au pair must attend in-person classes and pass or formally audit academic coursework equivalent to one semester class (three semester hours or their equivalent)

(2) *Continuing education option:* Enroll in a continuing education institution and successfully complete in-person classroom-based coursework.

(i) For the initial twelve-month program and for a nine- or twelve-month extension, an au pair must successfully complete 10 continuing education credits/units (CEUs) which is equivalent to 100 contact hours;

(ii) For a six-month extension an au pair must successfully complete five CEUs or 50 contact hours.

(3) *Customized course option:* Enroll in an in-person classroom-based, customized course designed for au pairs and developed by a sponsor with a U.S. post-secondary accredited academic institution or a continuing education institution:

(i) For the initial twelve-month program and for a nine-or twelve-month extension, an au pair must pass or formally audit a customized course that is equivalent to nine semester hours, ten CEUs, or 100 contact hours.

(ii) For a six-month extension, an au pair must successfully complete three semester hours, five CEUs, or 50 contact hours,

(4) *Combination option:* Complete a combination of community service and in-person academic or continuing education coursework.

(i) For the initial twelve-month program and for a nine- or twelve-month extension, an au pair must successfully complete:

(A) 48 hours of volunteer, unpaid community service at a 501(c)(3) tax exempt organization that is dedicated to a charitable, civic, humanitarian, or other similar purpose; and

(B) Successfully pass or audit three semester hours of in-person classroom based academic coursework at a U.S. post-secondary academic institution, or five CEUs or 50 contact hours of in-person continuing education classes.

(ii) For a six-month extension, an au pair must successfully complete:

(A) 45 hours of volunteer, unpaid community service at a 501(c)(3) tax exempt organization that is dedicated to a charitable, civic, humanitarian, or other similar purpose; or

(B) Successfully pass or audit three semester hours of in-person classroom based academic coursework at a U.S. post-secondary academic institution or five CEUs or 50 contact hours of in-person continuing education classes.

(5) *Incomplete Educational Component.* Au pairs that do not successfully complete the educational component of an initial placement are not eligible for an extension or to repeat the program.

(6) *Educational allowance.* Sponsors must ensure that host families pay directly to the au pair or the academic or continuing education institutions and present evidence of payment to their local coordinator and the au pair, towards actual and documentable course-related or community service costs necessary for the au pair to fulfill the program's educational requirements, up to \$1,200 for a twelve-month program and an additional \$1,200 for a nine or 12-month program extension, or up to an additional \$600 for a six month program extension.

(p) *Monitoring.* Sponsors must fully monitor and document all au pair placements through personal contact (i.e., in-person, through a text conversation, through an email exchange, or on the telephone). At a minimum:

(1) Sponsors shall require that all local and regional organizational representatives maintain dated records of all personal contacts with au pairs and host families for which they are responsible (detailing issues or problems discussed) and all documentation concerning the au pairs' child care hours provided, compensation, or deductions from pay.

(2) Sponsors must require that local coordinators:

(i) Make personal contact with each au pair and that au pair's host family separately within 48 hours following the au pair's arrival at the host family home;

(ii) Meets in person with each au pair and that au pair's host family together at the host family home no more than two weeks after an au pair's arrival at the host family;

(iii) For rematch (for either or both the au pair and host family) make personal contact separately and twice monthly (for two months) with the au pair and host family following the re-placement; and

(iv) Are appraised of their obligation to report unusual or serious situations or incidents involving either the au pair or host family.

(3) Sponsors must require:

(i) Local coordinators make separate, monthly, and personal contact with each au pair and host family for which the local coordinator is responsible;

(ii) Quarterly personal contact and documentation by the regional coordinators with each au pair and host family for which the regional coordinator is responsible.

(4) Sponsors shall require that its local or regional coordinators organize and implement, at a minimum, one family day in-person conference for au pairs and their host families both during an au pair's initial placement and extended placement, if appropriate. Family day conferences must be held in locations that are no more than 120 miles from each host family residence.

(q) *Duration and extensions.* (1) The initial duration of an au pair program is one year (i.e., 12 consecutive months).

(2) The Department of State, in its sole discretion, may approve a one-time extension to stay with the current host family for a duration of six, nine, or 12 months for an au pair beyond the initial program period if the au pair still meets all eligibility requirements. Sponsors must submit applications and supporting materials for such extensions no less than 30 calendar days prior to the program end date listed on the au pair's Form DS-2019.

(3) Sponsors must submit extension application electronically in SEVIS and supporting documentation must be submitted to the Department of State on the sponsor's organizational letterhead and contain the following information:

(i) Au pair's name, SEVIS identification number, date of birth, the length of the extension period being requested;

(ii) Sponsor statement of assurance of the au pair's completion of the educational requirements during the initial program, as set forth in paragraph (o) of this section, through a transcript, certificate of completion, volunteer time sheet, or other suitable documentation; and

(iii) Proof of payment by the sponsor of the required non-refundable extension fee (see § 62.17) via Pay.gov.

(r) *Reporting requirements.* (1) In addition to the reporting requirements set forth in § 62.15, sponsors are required to submit the following supplemental reports annually by June 30:

(i) A report in SEVIS of all final program participation placements in the format directed by the Department of State. The information entered in SEVIS must be accurate to the best ability of the sponsor;

(ii) A summation of annual survey results for all host families and au pairs, indicating program strengths and weaknesses and level of satisfaction;

(iii) A summation of all complaints by host families and au pairs regarding host family or au pair participation in the program, nature of the complaint, its resolution, and whether any unresolved complaints are outstanding;

(iv) A summation of all situations that resulted in the removal or rematch of an au pair with more than one host family and situations where more than one au pair is placed with one host family during the program year;

(v) A complete set of all current promotional materials, brochures, or pamphlets distributed either to host families or au pairs by the sponsor or their foreign third parties (including original and English translation, as applicable);

(vi) An annual itemized fee and cost schedules, including recruitment fees and associated costs; these schedules must correspond to those that the sponsor (and the sponsor's third party) has included in its recruitment materials and posted to a visible location on the sponsor's website;

(vii) Itemized au pair price lists (in accordance with any template the Department of State may provide) that identify on a country-specific basis the costs exchange visitors must pay each sponsor and foreign third party in order to participate in the program. Sponsors must submit separate lists for each country/foreign third party and each list should provide that third party's website address; and

(viii) A report by a certified public accountant, conducted pursuant to a format and on a schedule designated by the Department of State, attesting to the sponsor's compliance with the procedures and reporting requirements set forth in this subpart;

(2) In addition to § 62.13(d), report within the next business day to the Department of State any incident or allegation involving the actual or alleged sexual harassment, exploitation or any other form of abuse, or rematch of an au pair;

(3) Within 30 days of execution of a new written agreement with a foreign third party, a sponsor must provide the Department of State with that third party's name and contact information (i.e., telephone number, e-mail address, physical mailing address, point of contact, and website address). The sponsor also must provide the Department of State with updated contact information or changes in material information for its foreign third party within 30 days

after receiving notice of any such change. Sponsors must utilize only vetted foreign entities identified in the Foreign Entity Report to assist in fulfilling the sponsors' core programmatic functions outside the United States, and they must inform the Department within 30 days after ceasing to work with a foreign third party previously identified.

(s) *Repeat participation.* Foreign nationals who enter the United States as au pairs, have successfully completed their programs, and have returned home are eligible to participate again as au pairs, provided that they have resided outside the United States for at least two years following completion of their most recent exchange program and meet all eligibility requirements as an au pair.

(t) *Relationship to state and local laws.* (1) In order to ensure nationwide consistency and coherent implementation of the Au pair category of the Exchange Visitor Program, the regulations in this section provide the exclusive requirements applicable to sponsors, host families and au pairs on the matters, and may not be supplemented by state or local law except as provided in paragraph (t)(3) of this section:

- (i) Au pair selection.
- (ii) Au pair placement.
- (iii) Hours and compensation.
- (iv) Unemployment insurance taxes and employment training taxes.
- (v) Minimum time off and paid time off and sick leave; and
- (vi) Educational component.

(2) In addition to the matters listed in paragraph (t)(1) of this section, the regulatory framework provided under this section shall preempt any state or local law that, in the Department of State's view, otherwise poses an obstacle to the realization of the objectives of the Au pair category of the Exchange Visitor Program except as provided in paragraph (t)(3) of this section. Sexual harassment and retaliation laws shall not be deemed to pose an obstacle to the realization of the objectives of the Au pair category.

(3) Notwithstanding the foregoing, state and local minimum wage and overtime pay requirements shall apply to au pairs where applicable and shall not be deemed to be an obstacle to the realization of the objectives of the Au pair category of the Exchange Visitor Program.

(u) *Severability.* In the event that any provision of this section is held invalid as applied to any person or circumstance, such provision shall be construed, as applied to other persons or circumstances, to have maximum effect to the extent permitted under law. If any provision of this section is deemed invalid and unenforceable in any circumstance, such provision is severable from the remaining provisions of this section.

(v) *Transition period.* Sponsors are not required to comply with the provisions of this section for au pairs with Program Begin Dates on the Form DS-2019 prior to the effective date of [180 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE]. Au pair exchange programs with a Program Begin Date on Form DS-2019 prior to [180 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE] are subject to the requirements of this section in effect at the time of the Program Begin Date. Any extensions of programs authorized prior to the effective date of [180 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE] are also subject to the requirements from this section that were in effect at the time of the Program Begin Date. Any new programs with a Program Begin Date on or after the effective date of [180 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE], or program extensions authorized on or after the effective date of [180 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE] are subject to the requirements set forth in this section.

Karen Ward,

Director, Office of Private Sector Exchange Designation,

Bureau of Educational and Cultural Affairs,

U.S. Department of State.

Billing Code 4710-05

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